APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

Petition For Certiorari Filed September 13, 1978

Certiorari Granted November 27, 1978

INDEX

DOCKET SUMMARY*

P. C. Pfeiffer Co., Inc., et al, v. Diverson Ford:

June 12, 1974	Formal Hearing at Beaumont, Texas, with submission of "AGREED STATEMENT OF FACTS AND STIPULATIONS."
August 29, 1974	DECISION AND ORDER of Administrative Law Judge Vanderheyden.
February 21, 1975	Oral Argument before Benefits Review Board at Houston, Texas.
March 21, 1975	DECISION of Benefits Review Board.
March 17, 1976	ORDER of the United States Court of Appeals for the Fifth Circuit consolidating *Ford* with Bryant vs. Ayers Steamship Co., et al.
September 27, 1976	DECISION of Court of Appeals for the Fifth Circuit, 539 F.2d 533.
June 27, 1977	ORDER of the Supreme Court of the United States vacating lower court opinion and remanding for further consideration, 433 U.S. 904.
June 16, 1978	DECISION of Court of Appeals for the Fifth Circuit on Remand, 575 F.2d 79.
September 13, 1978	PETITION FOR A WRIT OF CERTIORARI filed.
November 27, 1978	PETITION FOR A WRIT OF CERTIORARI, granted.

* Prepared by counsel for Petitioner.
Rule 36(1); Memorandum Instructions No. 4.

DOCKET SUMMARY*

Ayers Steamship Company, et al, v. Will Bryant:

October 18, 1973	AGREED STATEMENT OF FACTS AND STIPULATIONS, filed.
December 17, 1973	SUPPLEMENTAL AGREED STIPULATIONS OF FACT, filed.
May 7, 1974	Additional SUPPLEMENTAL AGREED STIPULATIONS OF FACT, submitted.
February 28, 1975	DECISION AND ORDER of Administrative Law Judge Devaney.
November 13, 1975	DECISION of Benefits Review Board.
March 17, 1976	ORDER of the United States Court of Appeals for the Fifth Circuit consolidating *Bryant* with Ford vs. P. C. Pfeiffer Co., Inc., et al.
September 27, 1976	DECISION of Court of Appeals for the Fifth Circuit, 539 F.2d 533.
June 27, 1977	ORDER of the Supreme Court of the United States vacating lower court opinion and remanding for further consideration, 433 U.S. 904.
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November 27 1978	PETITION FOR A WRIT OF CERTIORARI, granted.

* Prepared by counsel for Petitioner.
Rule 36(1); Memorandum Instructions No. 4.

DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS
BEAUMONT, TEXAS

74-LHCA-181
FILE NO. 8-188774

DIVERSON FORD, Claimant

v.

P. C. PFEIFFER COMPANY INC., Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

AGREED STATEMENT OF FACTS AND STIPULATIONS

On April 12, 1973, Mr. Diverson Ford was injured while employed by P. C. Pfeiffer Company, Inc., at Beaumont, Texas. The sole issue for determination at this time is whether this injury occurred within the jurisdiction of the Longshoremen's & Harbor Workers' Compensation Act or within the jurisdiction of the Texas Workmen's Compensation Act. The Claimant, Diverson Ford, the Employer, P. C. Pfeiffer Company, Inc. and its Insurance Carrier, Texas Employers' Insurance Association, stipulate and agree to the following facts for the purpose of permitting this jurisdictional dispute to be submitted to an Administrative Law Judge for decision:

I.

It is hereby stipulated and agreed that the Claimant, Diverson Ford, sustained an accidental injury on April 12, 1973, in the course and scope of his employment for the P. C. Pfeiffer Company, Inc. in the City of Beaumont, Texas, when he struck the tip of his second (middle) finger, left hand, with a hammer; that Texas Employers' Insurance Association had in effect, subject to the resolution of the jurisdictional question in this claim, Workmen's Compensation insurance covering employees of the P. C. Pfeiffer Company, Inc.; that notice of injury was timely given; that claim for compensation was timely filed; that the claim for compensation was timely controverted; and that the employer and its insurance carrier have furnished such medical care and attention as the nature of the injury and the progress of recovery have required. It is further stipulated and agreed that during the year next preceding injury, the Claimant, Diverson Ford, had an average weekly wage of $57.83, and his compensation rate under the Longshoremen's Act, if applicable, would be $57.83 per week for total disability and $38.56 per week for permanent partial disability. That following the injury in question, he sustained a period of temporary total disability from April 12, 1973 to May 7, 1973, a period of four weeks, for which compensation under the Longshoremen's Act would amount to $231.32.

It is further stipulated and agreed that the insurance carrier has paid to the claimant compensation for temporary total disability for four weeks at the weekly rate of $34.52 per week in the total sum of $138.08 under the Workmen's Compensation Act of Texas; that if jurisdiction is found to exist under the Longshoremen's Act, the Employer and Insurance Carrier are entitled to a credit in this amount against the agreed upon figures as the compensation under the Longshoremen's Act; that whatever additional compensation, if any, Claimant may be entitled to under the Texas Act if jurisdiction is found not to exist under the Longshoremen's Act will be determined after any party has exhausted whatever appellate procedures they may take on the jurisdictional issue in this claim.

II.

The injury occurred between the rails of the gantry crane on City Dock No. 2 at the Port of Beaumont, which is an open concrete apron dock approximately 170 feet in width. The gantry crane runs on permanent rails along the edge of the dock, with two railroad tracks running within the span of the gantry and thus under the boom. The rail of the gantry nearest the water is approximately two feet, seven inches from the edge of the dock, with the distance between the rails of the gantry being 32 feet, two inches. This gantry crane is used in the loading and unloading of vessels, but when no vessel loading or unloading operations are in progress, it is also used in the loading and unloading of railroad cars.

On the attached aerial photograph (Exhibit 1) the pertinent areas are indicated as follows:

1. The gantry crane is located at the end of the yellow arrow numbered 1.
2. The No. 2 dock apron is marked at the end of the yellow arrow numbered 2.

3. The vehicle storage areas are marked at the end of the yellow arrow numbered 3.

Additionally, on the attached diagram (Exhibit 2), the pertinent areas are indicated by the same numbers. Exhibit 1 was not taken on the date of the accident and at the time this photograph was taken a vessel was at the berth adjacent to the crane and vehicles were stored on the dock apron itself. Neither of these two noted conditions existed on the morning of Claimant's accident.

III.

Claimant was working as a member of a securing gang out of Warehousemen's Local 1316 and was engaged in fastening military vehicles onto railroad flat cars in the area between the rails of the gantry crane when he accidentally struck the end of his finger with a hammer. On the date of the Claimant's' injury, April 12, 1973, no vessel was docked at City Dock No. 2, and the gantry crane was not in use for any purpose. On the previous day, the crane had been employed to load heavy military vehicles out of a nearby storage area onto railroad flat cars for shipment inland. Some the military vehicles had been towed or driven from a yard storage area (marked as No. 3 on the attached Exhibits) to a spot within the reach of the gantry crane (No. 1 on the attached Exhibits) and then had been lifted onto the railroad cars for ultimate transportation to an inland arsenal. Additionally, Claimant would testify that some, but not all, of the military vehicles loaded aboard the railroad cars came from storage on the dock apron itself. The railroad cars remained overnight under the gantry crane, and Claimant was employed on the following morning as

a member of a warehousemen's gang for the sole purpose of securely fastening the military vehicles to the railroad cars. Claimant would testify that he had been employed in the work of bringing the vehicle back to the crane and placing it on to the rail car on the day prior to his accident, but the payroll records of the employer indicate that claimant was not employed at all on the day prior to his accident. These records indicate that Ford was employed on April 9 and 10, 1973, in a warehouseman capacity shifting bagged cargo, that he was not employed on April 11, 1973, and that he was employed again in a warehouseman capacity on April 12, 1973 to secure the military vehicles onto the railroad cars.

The eight vehicles on which the Claimant's securing gang was working had been delivered to the Port of Beaumont on prior occasions and placed in a vehicle storage yard (marked as # 3 on the Exhibits) near the concrete apron (#2 on the Exhibits) of City Dock No. 2. Some, but not all, of the vehicles may have been stored on the dock apron itself. Seven of the vehicles had been brought to Beaumont by the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, and the vehicles had been discharged to the storage yard on March 25 and 26, 1973, seventeen days before Claimant's accident. One of the vehicles had been brought to Beaumont by the SS JAMES which had completed discharging on the morning of April 10th and had sailed from Beaumont on the afternoon of April 10th, 1973, two days before Ford's accident. The exact military vehicle on which the Claimant was working at the moment of his accident has not been identified, but it definitely was one of the eight described above which had come from the

vehicle storage yard or from the dock storage area itself. The vehicle on which Claimant was working had been brought from the storage area and loaded aboard the rail car on the day prior to the accident. On the morning of the accident Claimant was engaged solely in securing the vehicle to the rail car for shipment inland.

IV.

Ford was employed by the Warehouse Division of P. C. Pfeiffer Company, Inc. Pfeiffer is a multi-faceted corporation which in its various capacities performs warehousing services for the Port of Beaumont, contract stevedoring services for various shipping lines and agencies, and shipping agency services for various shipping lines and vessels. Those employees of the shipping agency and contracting stevedoring division of P. C. Pfeiffer Company, Inc. do have occasion to work aboard vessels on the navigable waters of the United States in the course of their employment, but men employed by the Warehouse Division of Pfeiffer and working out of the Warehousemen's local union never go aboard vessels or otherwise work on the navigable waters of the United States. However, claimant has worked in the stevedoring division of P. C. Pfeiffer aboard deepsea vessels as well as for other stevedoring companies within the Port of Beaumont. Pfeiffer's Warehouse Division is located within the offices of the Port of Beaumont Navigation District and thus is physically separated from the stevedoring division of the Company. All warehouse operation orders are received by Pfeiffer from the Port of Beaumont on the basis of an exclusive contract between Pfeiffer and the Port for these warehousing services. When government cargo is involved, whether inbound or outbound from the Port of Beaumont,

the Port of Beaumont is paid for these warehousing services by the Government. When non-military cargo is involved, the Port of Beaumont is paid for these warehousing services by the shipper if the cargo is outbound and by the receiver of the cargo if it is inbound. Pfeiffer's stevedoring operations are conducted directly for shipping agencies or vessels on the basis of bidding for the particular work to be performed. Whenever the peculiar nature or size of the cargo or the exigencies of scheduling require that cargo be loaded directly from a railroad car or truck to a vessel or directly from the vessel to a railroad car or truck, such work is jurisdictionally allocated to the deep sea longshoremen and is necessarily performed by men working out of the deep sea local unions for stevedoring companies. No men working out of the warehousemen's local unions are involved at all in such loading or unloading operations, nor are the warehouse employer's management personnel involved in such operations.

Pfeiffer, the Claimant's employer, had not performed the stevedoring services for either vessel which delivered the military vehicles on which Claimant was working at the time of his accident. Pfeiffer's agency division had performed ship's agent services, but not stevedoring services for the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, but Pfeiffer had no connection whatever with the call of the SS JAMES at the Port of Beaumont which ended April 10, 1973. No employees of P. C. Pfeiffer Company had participated in any way in the physical removal of the military vehicles from the oceangoing vessels or their transfer to the vehicle storage yard within the terminal area. The warehouse division of P. C. Pfeiffer Co., Inc. was employed to load

and prepare the vehicles for shipment inland by rail, and Ford was employed solely to fasten the vehicles onto the rail cars.

Ford was working out of Warehousemen's Local 1316. Men working out of the Warehousemen's Local at the warehousemen's rate of pay never go aboard vessels and never approach a vessel's cargo whip. Warehousemen are never involved in the moving of cargo directly from a vessel to a point of rest in the warehouse or storage area or directly from a vessel to railroad cars or trucks and they are never involved in the moving of cargo from a warehouse or storage area point of rest directly to a vessel or from railroad cars or trucks directly to a vessel, because such activities are allocated jurisdictionally to the men working out of Longshoremen's Deep Sea Local Nos. 325, 1306 or 1610. This stipulation, however, shall not be interpreted as being a stipulation by the claimant that he was not engaged in the loading or unloading of a vessel for purposes of the Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972. Rule No. 1 of the agreement governing the relationship between the Warehousemen's Local Union and the warehouse employers is as follows:

> "Warehouse workers shall have jurisdiction over all warehouse work done by the above named employer or employers. They shall have jurisdiction over all carloading and unloading from railroad car to pile and from pile to car, loading and unloading trucks and vehicles when under the jurisdiction of the employer, sewing sacks, recooperage, piling dunnage, segregating and chopping of all freight and bracing all cars when under the jurisdiction of warehouse locals, sweeping and cleaning of warehouse

> when under the jurisdiction of employer and all mechanical equipment when under the jurisdiction of the employer."

Similarly, the Deepsea Longshore agreement provides with regard to the definition of longshoring work (as opposed to warehouse, quaymen or other type work) that:

> "Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ship, * * * The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. * * * "

These contractual provisions reflect the work agreement described above, whereby no men working out of the Warehousemen's local are engaged in moving cargo directly to or from ships and no deepsea longshoremen handle cargo shoreward after it has been laid down or piled. It is expressly agreed, however, that nothing herein shall preclude Claimant from asserting that he was engaged in the loading or unloading of a vessel for purposes of the Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972.

The foregoing stipulations are entered into by all of the parties and the Solicitor of Labor for the purpose of permitting the jurisdictional question as to the coverage of the Longshoremen's & Harbor Workers' Compensation Act to be resolved by an Administrative Law Judge.

/s/ DIVERSON FORD
Diverson Ford, Claimant

DOWNMAN, JONES &
SCHECHTER

/s/ J. WELDON GRANGER
Attorneys for Claimant

P. C. PFEIFFER CO., INC.

/s/ M. ARNAUD
Employer

TEXAS EMPLOYERS'
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OFFICE OF THE SOLICITOR
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/s/ JOSHUA T. GILLELAN
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Programs

EXHIBIT 1

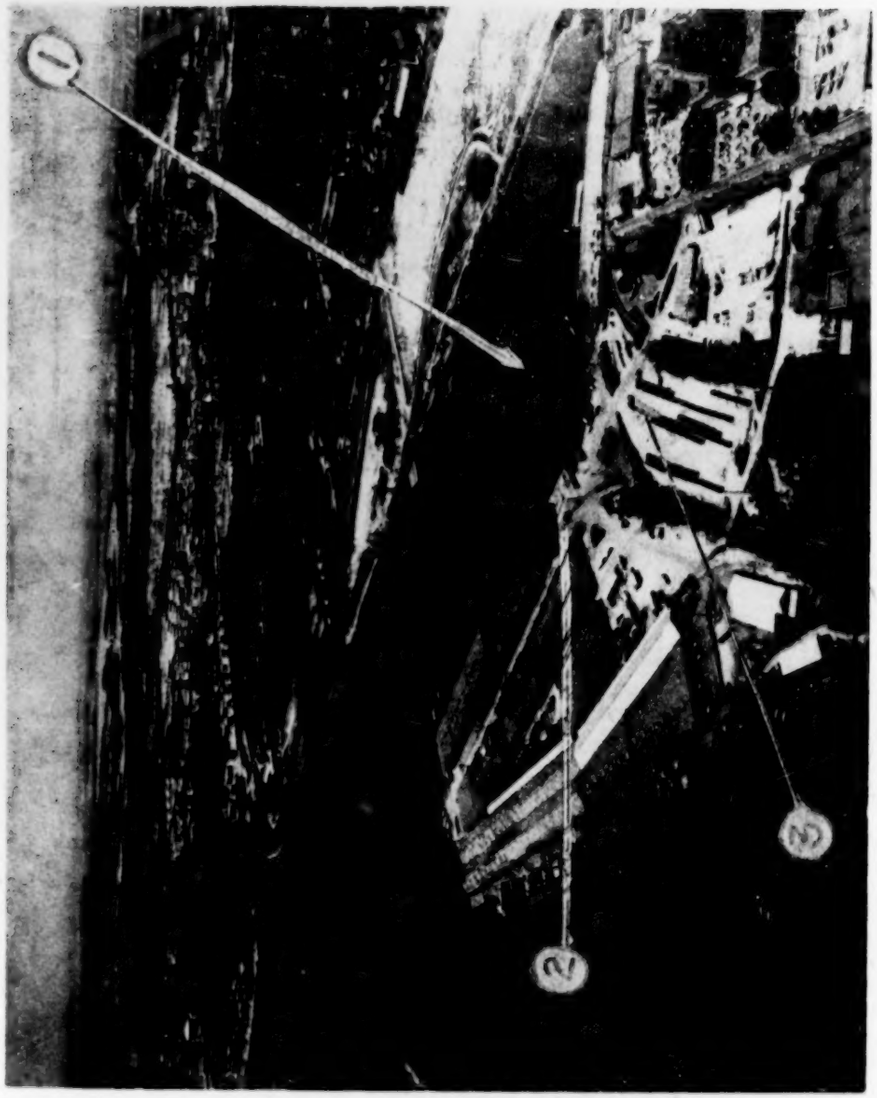
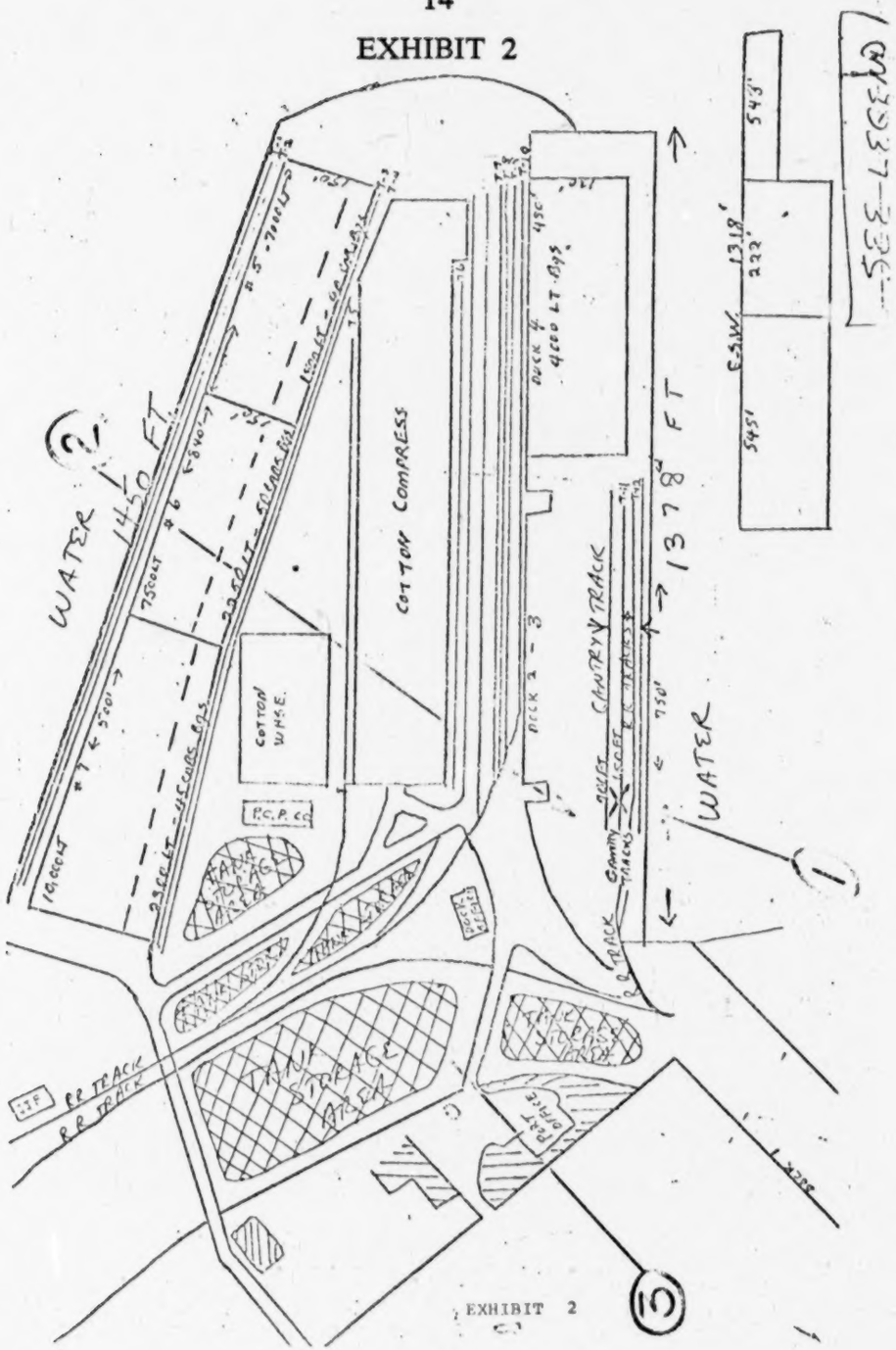


EXHIBIT 1

EXHIBIT 2



LEGEND

1. Lines numbered T-1 through T-12 are RR tracks.
2. Lines numbered T-11 and T-12 are RR tracks on docks numbered 2 and 3. These RR tracks run between the gantry tracks and underneath the gantry.
3. The five (5) crosshatched areas are storage areas for army tanks and trucks in the "yard" at Port of Beaumont. (Tanks are stored in these areas from the time they are discharged from a vessel until they are ready for shipment by rail.)
4. Tanks are towed by a tractor up onto docks 2 and 3 from the crosshatched storage area.
5. Gantry will pickup tank and place on flatcar sitting on tracks T-11 and/or T-12.
6. Tanks are secured on flatcars at some location, T-11 and/or T-12.
7. Flatcars will then be towed from Port of Beaumont to destination.

DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS
BEAUMONT, TEXAS

74-LHCA-181
File No. 8-18874

DIVERSON FORD, Claimant

v.

P. C. PFEIFFER COMPANY, INC.
Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Insurance Carrier

SUPPLEMENTAL AGREED STATEMENT OF FACTS AND STIPULATIONS

Pursuant to inquiry from the Honorable Frank W. Vanderheyden, the Administrative Law Judge hearing the captioned case, the Claimant, the Employer, the Insurance Carrier and the Director, Office of Workmen's Compensation Programs, by and through their attorneys of record, stipulate and agree to the following additional facts for the purpose of permitting this jurisdictional dispute to proceed to decision by the Administrative Law Judge.

I.

Claimant Diverson Ford was working as a warehouseman on the morning of his accident, but "claimant has

worked in the stevedoring division of P. C. Pfeiffer aboard deep sea vessels as well as for other stevedoring companies within the Port of Beaumont." (Original Stipulation, Exhibit JX-1, p. 5).

In the year prior to his injury on April 12, 1973, Claimant worked thirty-seven days as a warehouseman for P. C. Pfeiffer Company, two days as a longshoreman for P. C. Pfeiffer Company, two days as a warehouseman for J. J. Flanagan Company, three days as a longshoreman for J. J. Flanagan Company, and two days as a longshoreman for Biehl and Company. Thus he worked a total of 39 days as a warehouseman and 7 days as a longshoreman. He also worked for a beer distributing company and for a construction company in shoreside employment during the year prior to his injury. On no single day did Claimant work both as a warehouseman and as a longshoreman.

II.

Warehouse labor is obtained in the following manner in the Port of Beaumont:

> "All warehouse operation orders are received by Pfeiffer from the Port of Beaumont on the basis of an exclusive contract between Pfeiffer and the Port for these warehousing services." (Original Stipulation, Exhibit JX-1, p. 5):

Pfeiffer then determines the number of gangs of warehousemen necessary to perform the ordered work within the ordered time period, and calls the warehousemen's local union business agent to request the necessary number of gangs for the following day's work. A warehouse gang usually consists of five men, including the foreman.

An individual obtains warehouse work by reporting to the Warehousemen's Union hall, 224 Tevis Street, on the morning he wishes to work where he may be chosen by the gang foreman for one of the gangs according to his seniority. If an individual wishes to do longshore work, he reports to one of the longshoremen's union halls at 430 Shamrock, 580 Buford or 1685 Pennsylvania, where he may be chosen by the gang foreman for one of the longshore gangs which have previously been ordered from the longshoremen's local union business agent by one of the stevedoring companies. There is nothing to prevent a man who is not chosen by a gang foreman for warehouse work on a given day from going to the longshoremen's union hall in hope of obtaining a spot from a gang foreman in an unfilled longshore gang, and conversely, a man who is not chosen by a gang foreman for a longshoring job on any given day may go to the warehouse local in hope of finding a warehouseman's gang unfilled for that particular day. Employers, however, simply order gangs of labor from the union business agent appropriate to the type of work to be performed, and cannot choose or order any particular gang foreman or any individual to work in a particular work classification. Gangs hired from the longshore locals cannot be assigned to do warehousemen's work, and gangs hired from the warehouse local cannot be assigned to do longshoremen's work. Pfeiffer's Warehouse Division orders the necessary warehouse gangs, while separate personnel in the Stevedoring Division order the longshore gangs from the longshore locals, and

> "Pfeiffer's Warehouse Division is located within the offices of the Port of Beaumont Navigation District and thus is physically separated from the Stevedoring Division of the Company." (Original Stipulation, Exhibit JX-1, p. 5.)

The foregoing facts are stipulated and agreed to by the parties by and through their attorneys of record.

DOWNMAN, JONES & SCHECHTER

/s/ J. WELDON GRANGER
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ROYSTON, RAYZOR, COOK & COOK

/s/ W. ROBINS BRICE
Attorneys for P. C. Pfeiffer Company, Employer, and Texas Employers' Insurance Agency, Insurance Company

OFFICE OF THE SOLICITOR
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/s/ JOSHUA T. GILLELAN
Attorney for Director, Office of Workmen's Compensation Programs

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

In the Matter of DIVERSON FORD, Claimant

v.

P. C. PFEIFFER COMPANY, Employer
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Carrier

Case No. 74-LHCA-181
Formerly Case No. 8-18874

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U.S. Department of Labor
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For the Director, Office of
Workmen's Compensation Programs

Before: FRANK W. VANDERHEYDEN
Administrative Law Judge

DECISION AND ORDER

STATEMENT OF THE CASE

Pursuant to the provisions of the Longshoremen's and Harbor's Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (hereinafter Act) and the Rules and Regulations promulgated thereunder, a hearing in the subject matter was held before me on June 12, 1974, in Beaumont, Texas. All parties were represented by counsel. A designee of the Solicitor of Labor appeared and participated on behalf of the Director of the Office of Workmens' Compensation Programs pursuant to 20 CFR 702.333(b). At the hearing no witnesses were called. By stipulation of all parties including, but not limited to, the Claimant, the case was submitted on a document entitled Agreed Statement of Facts and Stipulations (JX-Joint Exhibit-1) which was received into evidence (hereinafter sometimes referred to as Stipulation) and oral stipulations. The parties were given a full opportunity to be heard and to make oral arguments. Thereafter, the parties filed proposed findings and briefs which were duly considered. Immediately after the hearing, accompanied by all counsel, I went to City Dock No. 2, Port of Beaumont, and reviewed the area in question. Also subsequent to the hearing, I requested counsel for the parties to clarify an aspect of the Claimant's employment which was done by another document designated as Supplemental Agreed Statement of Facts and Stipulations (JX 2; hereinafter sometimes referred to as a Supplemental Stipulation).

The single issue in this matter is whether or not the claim for compensation comes within the purview of the

Act. The Claimant and the Director of the Office of Workmen's Compensation Programs (hereinafter Director) take the position, that on the facts set forth below, the Claimant is an "employee" for reason that he meets the definition of such in the Act, with additional support for this to be found in the legislative history. For the same reasons, P. C. Pfeiffer Company and Texas Employers' Insurance Group (referred collectively hereinafter as Employer) contend that the Claimant is not an "employee."

Upon the entire record in this case I make the following findings of fact, conclusions of law and order:

FACTS

The pertinent facts, abstracted from the aforementioned Stipulations (altered slightly in form only) are as follows:

The Claimant, Diverson Ford, sustained an accidental injury on April 12, 1973, in the course and scope of his employment for the Employer, when he struck the tip of his second (middle) finger, left hand, with a hammer. The insurance carrier for the Employer's liability under workmen's compensation is the Texas Employers' Insurance Association. It was agreed that notice of injury was timely given; that claim for compensation was timely filed; that the claim for compensation was timely controverted, and that the Employer furnished medical care for the Claimant.

During the year preceding injury, Claimant had an average weekly wage of $57.83; that his compensation rate under the Act, if applicable, would be $57.83 per week for total disability and $38.56 per week for permanent partial disability. Following the injury Claimant sustained a period of temporary total disability from April 12, 1973, to May 7, 1973, a period of four weeks. The Employer paid Claimant compensation for temporary total disability for four weeks at the weekly rate of $34.52 per week in the total sum of $138.08 under the Workmen's Compensation Act of Texas.

The accident which resulted in the injury occurred between the rails of a gantry crane on City Dock No. 2 at the Port of Beaumont, Texas, which is an open concrete apron dock approximately 170 feet in width. The gantry crane runs on permanent rails along the edge of the dock, with two railroad tracks running within the span of the gantry and thus under the boom. The rail of the gantry nearest the water is approximately two feet, seven inches from the edge of the dock, with the distance between the rails of the gantry being 32 feet, two inches. This gantry crane is used in the loading and unloading of vessels, but when no vessel loading or unloading operations are in progress, it is also used in the loading and unloading of railroad cars.

As an attachment to the Stipulation, the parties submitted an aerial photograph of the site in question, designated as Exhibit 1, which photograph purports to show the location of the gantry crane, the concrete dock apron and the vehicle storage area, respectively numbered on the aforementioned Exhibit 1, 2, and 3. Also attached to the Stipulation was Exhibit 2, which was a sketch of the pertinent areas mentioned above, which locations were indicated by the same numbers. At the time the photographs was taken a vessel was at the berth adjacent to the crane and vehicles were stored on

the dock apron itself. Neither of these two noted conditions existed on the morning of Claimant's accident.

Claimant was working as a member of a securing gang out of a warehousemen's local and was engaged in fastening military vehicles onto railroad flat cars in the area between the rails of the gantry crane when the accident occurred. On the date of Claimant's injury, no vessel was docked at City Dock No. 2, and the gantry crane was not in use for any purpose. On the previous day, the crane had been employed to load heavy military vehicles out of a nearby storage area onto railroad flat cars for shipment inland. Some of the military vehicles had been towed or driven from a yard storage area (No. 3 on Exhibits attached to Stipulation) to a spot within the reach of the gantry crane (No. 2 on Exhibits attached to Stipulation) and then had been lifted onto the railroad cars for ultimate transportation to an inland arsenal.

Additionally, Claimant would testify that some, but not all, of the military vehicles loaded aboard the railroad cars came from storage on the dock apron itself. The railroad cars remained overnight under the gantry crane, and Claimant was employed on the following morning as a member of a warehousemen's gang for the sole purpose of securely fastening the military vehicles to the railroad cars. Claimant would testify further that he had been employed in the work of bringing the vehicle back to the crane and placing it on to the rail car on the day prior to his accident. However, the payroll records of the Employer indicate that Claimant was not employed at all on the day prior to his accident. These records indicate Claimant was employed on April 9 and 10, 1973, in a warehouseman capacity shifting bagged

cargo, that he was not employed on April 11, 1973. and that he was employed again in a Warehouseman capacity on April 12, 1973 to secure the military vehicles onto the railroad cars.

The eight vehicles on which the Claimant's securing gang were working had been delivered to the Port of Beaumont on prior occasions and placed in a vehicle storage area near the concrete apron of City Dock No. 2. Some, but not all, of the vehicles may have been stored on the dock apron itself. Seven of the vehicles had been brought to Beaumont by the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, and the vehicles had been discharged to the storage yard on March 25 and 26, 1973, seventeen days before Claimant's accident. One of the vehicles had been brought to Beaumont by the SS JAMES, which had completed discharging on the morning of April 10th and had sailed from Beaumont on the afternoon of April 10th, 1973, two days before Claimant's accident. The exact military vehicle on which Claimant was working at the moment of his accident has not been identified but it definitely was one of the eight described above which had come from the vehicle storage yard or from the dock storage area itself. The vehicle on which Claimant was working had been brought from the storage area and loaded aboard the rail flatcar on the day prior to the accident. On the morning of the accident Claimant was engaged solely in securing the vehicle to the rail car for shipment inland.

Claimant was employed by the Warehouse Division of the Employer, a multi-faceted corporation which in its various capacities performs warehousing services for the

Port of Beaumont, contract stevedoring services for various shipping lines and agencies, and shipping agency services for various shipping lines and vessels. Those employees of the shipping agency and contracting stevedoring division of the Employer do have occasion to work aboard vessels on the navigable waters of the United States in the course of their employment, but men employed by the Warehouse Division of the Employer and working out of the warehousemen's local union never go aboard vessels or otherwise work on the navigable waters of the United States. However, Claimant has worked in the stevedoring divisions of the Employer aboard deep sea vessels as well as for other stevedoring companies within the Port of Beaumont.

An individual obtains warehouse work by reporting to the warehousemen's union hall, on the morning he wishes to work where he may be chosen by the gang foreman for one of the gangs according to his seniority. If an individual wishes to do longshore work, he reports to one of the longshoremen's union halls, when he may be chosen by the gang foreman for longshore work which had been ordered previously from the longshoremen's local union business agent by one of the stevedoring companies. There is nothing to prevent a man who is not chosen by a gang foreman for warehouse work on a given day from going to the longshoreman's union hall in hope of obtaining a spot from a gang foreman in an unfilled longshore gang. Conversely, a man who is not chosen by a gang foreman for a longshoring job on any given day may go to the warehouse local in hope of finding a warehouseman's gang unfilled for that particular day.

The Employer determines the number of gangs of warehousemen necessary to perform the ordered work within the ordered time period, and calls the warehousemen's local union business agent to request the necessary number of gangs for the following day's work. A warehouse gang usually consists of five men, including the foreman. An Employer cannot choose or order any particular gang foreman or any individual to work in a particular work classification.

Gangs hired from the longshore locals cannot be assigned to do warehousemen's work, and gangs hired from the warehouse local cannot be assigned to do longshoremen's work. On no single day did Claimant work both as a warehouseman and as a longshoreman.

In the year prior to his injury on April 12, 1973, Claimant worked thirty-seven days as a warehouseman and two days as a longshoreman for the Employer. He also worked two days as a warehouseman, and three days as a longshoreman for J. J. Flanagan Company, and two days as a longshoreman for Biehl and Company. Thus he worked a total of 39 days as a warehouseman and 7 days as a longshoreman. He also worked for a beer distributing company and for a construction company in shoreside employment during the year prior to his injury.

The Employer's Warehouse Division is located within the offices of the Port of Beaumont Navigation District and thus is physically separated from the stevedoring division of the Company. All warehouse operation orders are received by the Employer from the Port of Beaumont on the basis of an exclusive contract between the Employer and the Port.

When a government cargo is involved, whether inbound or outbound, from the Port of Beaumont, the Port is paid for these warehousing services by the Government. When nonmilitary cargo is involved, the Port is paid for these warehousing services by the shipper if the cargo is outbound and by the receiver of the cargo if it is inbound. The Employer's stevedoring operations are conducted directly for shipping agencies or vessels on the basis of bidding for the particular work to be performed. Whenever the peculiar nature or size of the cargo or the exigencies of scheduling require that cargo be loaded directly from a railroad car or truck to a vessel or directly from the vessel to a railroad car or truck, such work is jurisdictionally allocated to the deep sea longshoremen and is necessarily performed by men working out of the deep sea local unions for stevedoring companies. No men working out of the warehousemen's local unions are involved at all in such loading or unloading operations, nor are the Employer's warehouse management personnel involved in such operations.

The Employer had not performed the stevedoring services for either vessel which delivered the military vehicles on which Claimant was working at the time of his accident. The Employer's agency division had performed ship's agent services, but not stevedoring services for the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, but the Employer had no connection whatever with the call of the SS JAMES at the Port of Beaumont which ended April 10, 1973. No employees of the Employer had participated in any way in the physical removal of the military vehicles from the ocean going vessels or their transfer to the vehicle storage yard within the terminal area. The warehouse division of the Employer was retained to load and prepare the vehicles for shipment inland by rail, at which task Claimant was employed when the accident occurred resulting in his injury.

Claimant was working out of Warehousemen's Local 1316. Men working out of the Warehousemen's Local at the warehousemen's rate of pay never go aboard vessels and never approach a vessel's cargo ship. Warehousemen are never involved in the moving of cargo directly from a vessel to a point of rest in the warehouse or storage area or directly from a vessel to railroad cars or trucks and they are never involved in the moving of cargo from a warehouse or storage area point of rest directly to a vessel or from railroad cars or trucks directly to a vessel. Such activities are allocated jurisdictionally to the men working out of Longshoremen's Deep Sea Local Nos. 325, 1306 or 1610. However, counsel were in accord that the Stipulation shall not be interpreted as being an agreement by the Claimant that he was not engaged in the loading or unloading of a vessel for purposes of the Act. Rule No. 1 of the agreement governing the relationship between the Warehousemen's Local Union and the warehouse employers is as follows:

> "Warehouse workers shall have jurisdiction over all warehouse work done by the above named employer or employers. They shall have jurisdiction over all carloading and unloading from railroad car to pile and from pile to car, loading and unloading trucks and vehicles when under the jurisdiction of the employer, sewing sacks, recooperage, piling dunnage, segregating and chopping of all freight and bracing all cars when under the jurisdiction of warehouse

locals, sweeping and cleaning of warehouse when under the jurisdiction of employer and all mechanical equipment when under the jurisdiction of the employer."

The Deep Sea Longshore agreement provides, with regard to the definition of longshoring work (as opposed to warehouse, quaymen or other type work), that:

"Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ship, * * * The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. * * * "

These contractual provisions reflect the work arrangement described above, whereby no men working out of the Warehousemen's local are engaged in moving cargo directly to or from ships and no deep sea longshoremen handle cargo shoreward after it has been laid down or piled. However, it is expressly agreed, that nothing in the Stipulation shall preclude Claimant from asserting that he was engaged in the loading or unloading of a vessel for purposes of the Act.

It was also stipulated orally between the parties at the hearing, and I so find, that the Claimant sustained permanent partial disability to the second (middle) finger of his left hand to the extent of twenty percent over a six-week period of $38.56 per week for a total amount of $231.36.

I find the foregoing facts have been established by the entire record in this case.

OPINION

With regard to the issue presented, the pertinent provisions of the Act are as follows:

Section 902. Definitions

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged in by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading and unloading, repairing, or building a vessel).

Section 903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The legislative history of the Act concerning the point in contention discloses the following:

> The intent of the Committee is to permit a uniform compensation system to apply to employees *who would otherwise be covered* by this Act for part of their activity. To take a typical example, cargo whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does *not* intend to cover employees who are not engaged in loading, *unloading*, repairing, or building *a vessel, just because* they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up *stored cargo for further trans-shipment* would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. *Likewise* the Committee has *no* intention of extending coverage under the Act to individuals who are *not* employed by a person who is an *employer*, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus an individual employed by a person *none* of whose employees work, in whole or part, *on navigable waters*, is not covered *even if* injured on a pier adjoining navigable waters. S. Rep. No. 92-1125, 92 Cong. 2d Sess. 13; H. Rep. No. 92-1441, 92 Cong. 2d Sess 10-11 (1972). (emphasis supplied)

One of the main reasons for the 1972 amendments to the Act is rooted in those decisions which premised coverage upon situs alone. To illustrate, in *Swanson v. Marra Bros, Inc.*, 328 U.S. 1 (1946), it was held that the Act did not cover a longshoreman injured on a dock even if the injury was caused by a vessel on navigable waters. This distinction between a longshoreman's activities aboard a vessel and his work on the pier was reaffirmed in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 224 (1969), which was the Court's last enunication on the point before the Act was amended in 1972. There the Court reiterated that Congress chose the line separating water from land at the edge of the pier. "The invitation to move the line landward must be addressed to Congress, not to this Court". To correct an apparent inequity, depending upon the happenstance of where a longshoreman was injured, Congress, among other changes, amended the Act to extend the geographic coverage landward. Congress also altered the definition of "employee" from a negative concept, where certain classes of people were excluded, to a positive statement setting forth certain conditions that a claimant must meet. Capsulizing the character of the changes in Sections 902 (2), (3) and 903, it would appear fair to state that while "situs" was expanded, "status" was constricted. The language of these amended Sections, coupled with the legislative history, however, make it palpable that Congress, in its effort to provide a uniform compensation system, did not intend to open the floodgates of coverage to any and all who met with injury or death upon the newly extended area.

There is agreement between the parties, and I so find, that the Claimant sustained his injury upon an area

which meets the requirements of Section 903(a). The parties begin with the absolute certainty, however, that the case hinges completely upon the definition of "employee". In the main this is so but for reasons mentioned below there are other considerations which are of some moment to the resolution of the issue.

Admittedly, labels attached to a job are not decisive and it is the nature of the work performed by the Claimant that is important. *Olvera v. Miachalos,* 307 F.Supp. 9 (S.D. Tex. 1968). Nonetheless, a job title at times is of assistance in determining the nature of a claimant's work. Also helpful in this respect are the terms of a union agreement. The contract provisions of the Warehousemen's and Deep Sea Longshore Agreement, above mentioned, and in fact the work performed, disclose a dichotomy which delineates distinctly the duties between longshoremen and warehousemen in the Port of Beaumont. The Deep Sea Longshoremen handle all loading and unloading of ships and are not involved in any movement of cargo on land after it has been removed from the ship and taken to a place storage or rest in a warehouse or terminal area. The longshoremen in loading a vessel transport the cargo solely from its place of storage in the warehouse or terminal area to the side of the vessel and place it aboard the ship. Warehousemen do not remove cargo from a vessel, or after its removal from the vessel to a warehouse or storage area. Nor do they move cargo from a warehouse or storage area point of rest directly alongside the vessel nor place it aboard same. Such work is exclusively within the jurisdiction of the Deep Sea Local.

In drafting the definition of "employee" we must indulge in the presumption that Congress in its wisdom

selected such significant words or phrases as "engaged in", "maritime employment" and "longshoreman" most carefully. For example, rather than choose a word of flexible meaning such as "affecting", the phrase "engaged in" was selected, with the reasonable implication being that a claimant must have something more than an indirect relationship with "maritime employment". The term "longshoreman" poses less of a problem and is deemed generally to be a laborer employed about the wharves of a port, especially in loading and unloading vessels. *Sulovitz v. U.S.,* 64 F. Supp. 637 (E.D. Pa. 1945).

No general rule had been fashioned sufficiently comprehensive to describe all the types of employment which are deemed maritime in nature. Outside of certain generally recognized fields, each case must be determined by its particular facts and circumstances. *Ellis v. Gulf Oil Corporation,* 48 F. Supp. 771, 772 (D.N.J. 1943). However, "[t]he management of the vessel, the loading [unloading] of same, the care of its equipment and cargo, the performance of any task essentially to enable it to accomplish its purpose upon navigable waters are within the term 'maritime employment'." *Massman Const. Co. v. Basset,* 30 F. Supp. 813, 815 (E.D. Mo. 1940), *rev'd. on other grounds,* 120 F.2d 230 (8th Cir. 1941), *cert. denied,* 314 U.S. 648 (1941).

Slight succor is found in general statements, however. The key to the present conundrum is to lay the facts concerning Claimant's employment and the Employer's activities alongside the statutory definitions and the legislative history. In the Senate and House Reports aforementioned, it is stated expressly that the Committee did

not intend to cover employees who are not engaged in unloading a vessel just because they are injured in an area adjoining navigable waters and whose only responsibility is to pick up stored cargo for further trans-shipment. Likewise the Committee had no intention of extending coverage to individuals who were not employed by a person who was an employer. For example, an individual employed by a person none of whose employees work in whole or in part, on navigable waters, even if injured on a pier adjoining navigable waters.

On the facts before us, Claimant and his warehousemen coworkers were not, as I interpret the definitions forementioned and the legislative history, engaged in either "maritime employment" or in "unloading" a vessel. The duties of Claimant and his fellow warehousemen, by the terms of the collective bargaining agreement, and in actuality, did not require them and, in fact, prohibited them from performing any unloading of vessels.

We are reminded in Claimant's brief that "any intermediate step prior to the final removal from the maritime facility is to be considered a 'maritime operation' under the Act". This conclusion is arrived at apparently because the Claimant was working near the water and alleged to be engaged in the final stages of unloading a vessel, a pregnant idea distinguished more by the ingenuity of its conception than by the strength of its persuasion. Rather than "unloading" a vessel, the facts could support reasonably the conclusion that the Claimant was engaged in the first stages of loading cargo for a consignee which cargo had already been physical or constructively delivered to such party. In this regard, it is of interest to note that the Stipulation states the

receiver of the cargo pays for the warehousing services. Stripped to its essentials, Claimant's duties were confined completely to land, where on the day in question his sole function was to affix the cargo (military tanks) to railroad flatcars for trans-shipment inland. As such, Claimant's "maritime employment" was nebulous to non-existent.

I find also that the Claimant was not working for an "employer" as this term is defined in Section 902(4), and as amplified by the Committee Reports, because of the absence of employees "employed in maritime employment". The record shows that employees of the employer had not performed any of the stevedoring services concerning the cargo, nor were such employees involved in transferring the cargo, on which Claimant was working subsequently when injured, to the storage yard within the terminal area. The Employer had merely the warehousing contract to prepare the vehicles for shipment inland by rail. These facts also appear to fall within that portion of the Committee Reports which states: "Thus, an individual employed by a person none of whose employees work, in whole or in part, or navigable waters, is not covered even if injured on a pier adjoining navigable waters".

To the writer's knowledge none of the jurisdictional questions under the aforementioned Sections of the Act have decided to date by the Benefits Review Board or the appropriate Federal Circuit Court of Appeals. Of those decisions on the Administrative Law Judge level possibly analogous to the instant matter is *Giacomo Avvento v. Hellenic Lines and Liberty Mutual Insurance Company*, 74-LHCA-63, which is cited in, and attached

to, the Director's brief to support the position Claimant is an "employee". However, there are at least two powerful and persuasive distinctions between *Avvento* and this case. First, and most important, in *Avvento* the claimant, a "legman" engaged in loading cases of sardines into a truck on the particular day of the accident, was a *longshoreman* and because of the interchangeability of jobs, could within the same day be assigned to the task of directly unloading a vessel. Not so with the Claimant here, whose duties were that of a warehouseman, pure and simple, having an attenuated link at best with the vessel from which cargo emanated. Second, the longshoreman in *Avvento* was found not to be picking up "stored cargo". Here the vehicles the Claimant was affixing to the flatcars could, on the facts set forth, in the Stipulation, be reasonably considered, and I so find, to be stored cargo. More recently, on the administrative law level, there was decided *James R. Bailey v. Nacirema Operating Company, Inc. and Liberty Mutual Insurance Company,* 74-LHCA-117, which in some regard is similar to the instant matter and also involved a jurisdictional issue. Again, however, the facts are significantly different. In *Bailey,* though engaged on the day of the accident in a process involving, "stuffing", i.e., loading logs onto a Moffet Trailer, the claimant was a *Longshoreman,* "frequently assigned to a regular longshoremen's gang, for work either aboard ship or on a dock, handling cargo". *Litwinowicz v. Weyerhaeuser Steamship Company,* 179 F. Supp. 812 (E.D. Pa. 1959), is cited also in the Director's brief, for the proposition that "loading" should not be given a niggardly construction. However, there the plaintiff, a *longshoreman,* was injured while working in a railroad car placing wooden chocks under

a draft of steel beams *preparatory* to their being hoisted *aboard* a ship. These facts are strikingly dissimilar from those before us.

Related in the briefs of counsel for Claimant and the Director are the following cases: *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *Young & Co. v. Shea,* 397 F.2d 185, 188 and 404 F.2d 1059, 1061 (5th Cir. 1968); *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114, 130 (1962). These are mentioned for the thesis that the Act, should be construed liberally in favor of injured workmen and that it should be read expansively. To these one might add, to mention a few, *Reed v. S. S. Yaka,* 373 U.S. 410, 415, (1963); *Michigan Mutual Liberty Co. v. Arrien,* 344 F.2d 640, 647 (2d Cir. 1965) and *Gibson v. Hughes,* 192 F. Supp. 564, 571 (S.D.N.Y. 1961). Notwithstanding that these cases were decided before the Act was amended it is conceded that it remains a remedial statute to be construed broadly. However, such generous construction should not be employed to frustrate the Congressional intent as evidenced by new definition of "employee" and the Committee Reports.

Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 460, 474 (1947) is also cited for the Section 20(a) presumption "that a claim comes within the provisions of this Act." However, the prefatory language to this give rise to such presumption only "in the absence of substantial evidence to the contrary". The record will show, and I so find, that the Employer has come forward with such evidence.

From the foregoing findings of facts, conclusions of law and upon the evidence contained in the record as a whole I make the following:

ORDER

The claim for compensation by Diverson Ford under the Longshoremen's and Harbor Workers' Compensation Act against P. C. Pfeiffer Company, Inc., and Texas Employers' Insurance Association is hereby denied.

/s/ FRANK W. VANDERHEYDEN
Frank W. Vanderheyden
Administrative Law Judge

Dated: August 29, 1974
Washington, D. C.

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

(SEAL)

BRB Nos. 74-191 and 74-191A

DIVERSON FORD
Claimant-Petitioner

v.

P. C. PFEIFFER COMPANY, INC.

and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Petitioner

v.

P. C. PFEIFFER COMPANY, INC.

and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Employer/Carrier-Respondents

Appeal from Decision and Order of Frank W. Vanderheyden, Administrative Law Judge, United States Department of Labor.

J. Weldon Granger (Downman, Jones and Schechter), Houston, Texas, for the claimant.

W. Robins Brice and E. D. Vickery (Royston, Rayzor, Cook and Vickery), Houston, Texas, for the employer/carrier.

Joshua T. Gillelan (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor), Washington, D. C., Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

DECISION

These appeals by the claimant and the Director, Office of Workers' Compensation Programs, are from the decision and order (74-LHCA-181) of Administrative Law Judge Vanderheyden denying compensation benefits pursuant to a claim filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act).

Claimant, employed as a warehouseman, injured a finger in 1973 while securing military vehicles onto railroad cars located on a concrete aprondock for inland shipment. The vehicles with which claimant was working had been unloaded from ships between two days and two and one-half weeks prior to the injury. The employer and carrier (hereinafter referred to as the employer) controverted the claim on the sole ground that the claim did not come within the provisions of the Act.

The administrative law judge found that the claimant was not an employee as described in Section 2(3) of

the Act, 33 U.S.C. § 902(3), and that the employer was not an employer as described in Section 2(4) of the Act, 33 U.S.C. § 902(4), and therefore denied compensation. The claimant and the Director appeal alleging that the 1972 amendments to the Act expanded coverage inland to include anyone, such as the claimant, engaged in longshoring operations.

Employer's argument that neither the claimant nor any other of the employer's employees were working over navigable waters on the date of the injury assumes that the coverage of "navigable waters" has come through the amendments unscathed. Such an assumption is unfounded since the language of amended Section 3(a) of the Act, 33 U.S.C. § 903(a), and amended Section 2(4) of the Act, 33 U.S.C. § 902(4), both apply to employment "upon the navigable waters of the United States (*including* any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)". (emphasis added).

The employer undisputedly had employees working in a geographical area within the scope of Sections 3(a) and 2(4). The Board finds it unnecessary to find, as urged by the employer, that at least one employee of the employer must be actually working *over* the water with a ship at the dock before an employer is determined to have employees employed over navigable waters within the provisions of amended Section 2(4) of the Act. The Board's inquiry is therefore directed to the claimant's duties on the date of the injury to determine whether he was engaged in maritime employment, because Section 3(a) having been satisfied, a determination of coverage

of an "employee" under Section 2(3) will implicitly satisfy the requirements of Section 2(4). *Harris v. Maritime Terminals and Aetna Casualty,* 1 BRBS 301, BRB No. 74-178(Feb. 3, 1975).

Section 2(3) of the Act, as amended, defines an employee as:

> Any person engaged in maritime employment, *including* any longshoreman or any other person engaged in *longshoring operations.* . . . (emphasis added).

This Board has found that longshoring operations include intermediate steps subsequent to unloading cargo, still in maritime commerce, from a ship and prior to its removal from the terminal for further transshipment. *Avvento v. Hellenic Lines Ltd.,* 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974). The very language of amended Section 2(3) includes anyone engaged in longshoring operation in the definition of an employee. The Board finds that the cargo with which the claimant was working was still in maritime commerce. *Avvento, supra; Adkins v. I.T.O.,* 1 BRBS 199, BRB No. 74-123 (Nov. 29, 1974). The claimant in *Avvento* was performing the same type of work as here, loading cargo which had previously been unloaded from a ship into a truck for removal from the pier. The fact that the claimant in *Avvento* was hired as a longshoreman and the claimant here was hired as a warehouseman is in no way a distinction under the Act. *See Coppolino v. I.T.O.,* 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974). It is the function of the employment, such as longshoring operations, and the situs of the injury that is controlling, not the title of the position.

The Board does not subscribe to a "point of rest" determination that the moment that cargo is unloaded from a ship and placed onto the dock, it ends its maritime nature. *Avvento, supra.* Any intent to limit coverage to persons actually involved with the loading and unloading of ships between the stringpiece and the hold of the ship could have been so expressed by Congress. *Coppolino, supra.*

The Board finds that the administrative law judge erred in finding that the claimant was not engaged in employment within the scope of the Act. Therefore, the decision and order appealed from is reversed and the case is remanded to the office of the Administrative Law Judges for further appropriate action.

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur:

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

/s/ JULIUS MILLER
Julius Miller, Member

Dated this 21st day
of March, 1975

(Jurat Omitted in Printing)

DEPARTMENT OF LABOR
OFFICE OF WORKMAN'S COMPENSATION PROGRAMS
GALVESTON, TEXAS

File No. 8-18217

WILL BRYANT, Claimant

v.

AYERS STEAMSHIP CO., INC., Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

AGREED STATEMENT OF FACTS
AND STIPULATIONS

On May 2, 1973, Mr. Will Bryant was injured while employed by Ayers Steamship Co., Inc. at Galveston, Texas. The sole issue for determination at this time is whether this injury occurred within the jurisdiction of the Longshoremen's & Harbor Workers' Compensation Act or within the jurisdiction of the Texas Workan's Compensation Statute. The Claimant, Will Bryant, and the Employer, Ayers Steamship Co., Inc., and its Insurance Carrier, Texas Employers' Insurance Association, stipulate and agree to the following facts for the purpose of permitting this jurisdictional dispute to be submitted to an administrative law Judge for decision:

I.

The accident occurred in a warehouse immediately adjacent to Pier 23, Port of Galveston, Texas. The pier adjoins the navigable waters of the United States. In the Port of Galveston, cotton is received by various shoreside cotton compress-warehouses from the inland shippers of cotton. The cotton is then drayed by trailers to the pier warehouses. When it arrives at the pier warehouses, the driver of the dray of trailers, together with two "headers" take the cotton off the trailers and move it to the designated place in the pier warehouse assigned by the agents operating or having control of that pierside warehouse. In some instances, the cotton is so drayed and stored when no particular vessel is designated for the eventual receipt of the cotton from the pierside warehouse though eventually all bales so placed are shipped out on navigable waters. It is stored as stated and left until it is moved by longshoremen, not *cotton headers,* to shipside. After the headers take the cotton off the compress trailers and put it to rest in the pier warehouses they do not touch it again. When the vessel comes in, the cotton is moved to shipside for loading and the "headers" have absolutely nothing to do with that operation.

II.

At the time of this accident, Bryant was rolling a bale along a special purpose cotton dray wagon to the edge of the wagon where it might be tipped up and headed off the wagon. The driver (an employee of Bluebonnet Warehouse) who had brought the cotton dray wagon to the warehouse was assisting him. A "spider" from the band-

ing on the bale caught Bryant's glove and pulled him along with the rolling bale so that his right hand was caught between two bales. Bryant sustained a fracture to the 5th Metacarpal bone in his right hand, among other injuries to the hand.

III.

Cotton headers are employed solely to unload cotton bales from shoreside transportation and store it in pierside warehouses. The Cotton Headers Union Contract provides:

> "It is recognized and agreed that breaking down cotton stacked for loading aboard ship is longshore work."

This contract provision is consistent with the custom of the port that movement of the cotton from pierside warehouse storage points to the ships is allocated jurisdictionally to the longshoring locals. Rule 20 Deepsea and Cotton Agreement which defines longshore work as "including all men who truck cargo direct to and from pile or car or to and from shipside or hatches" is completely consistent with this recognized industry practice. The "headers" never move the cargo from the pile to the ship. In addition, all direct loading from shoreside transportation onto the vessel is performed solely by deepsea longshoremen and not by cotton headers. Cotton headers work only to bring the cotton from a compress to a point of rest or pile in a pierside warehouse from which it is then shipped upon navigable waters. Bryant was performing cotton header or warehouse work and not longshore work at the time of his injury. He was not involved

in the loading of the ship insofar as industry practice is concerned, but this stipulation shall not prevent Bryant from contending that he was involved in the loading of the ship.

IV.

Bryant has worked exclusively as a cotton header or quayman out of Local 1308 for the past five or six years and has done no longshoring work. His work has on no occasion required him to go aboard a vessel on the navigable waters of the United States.

V.

The employer, Ayers Steamship Co., Inc., is a ship agency company and does not furnish stevedoring services to vessels. It does not employ longshoremen to load or unload vessels. In the event a vessel owner for whom Ayers is agent desires for it to arrange for stevedoring services, Ayers contracts with independent contracting stevedoring companies to perform the longshoring services of loading or unloading the vessel.

VI.

The cotton on which Bryant was working at the time of his accident was being stored in the pierside warehouse in anticipation of the arrival of the SS KOREAN EXPORTER. The vessel was not in port at the time of the accident and did not arrive at the dock until May 7, 1973. Although much of the cotton stored in the pierside warehouse during the period prior to the vessel's arrival was eventually shipped aboard the SS KOREAN EXPORTER, some of the cotton cargo of that vessel was

made up of cotton which had been stored in the pierside warehouse in anticipation of previous arrivals of various other ships. Additionally, some of the cotton stored in the pierside warehouse in anticipation of the arrival of the KOREAN EXPORTER was diverted to other vessels at other piers from its storage location of the pierside warehouse. This involved re-draying the cotton to another pierside warehouse, re-heading the cotton by cotton headers and storing it in another location, and then longshoremen removing the stored cotton from the second warehouse and loading it aboard a vessel. The cotton which Bryant was actually heading at the moment of his accident on May 2, 1973 was in fact loaded aboard the KOREAN EXPORTER by longshoremen on May 7, 1973. The loading of the KOREAN EXPORTER was accomplished by longshoremen employed by Young & Company, an independent contracting stevedoring corporation in no way affiliated with Ayers Steamship Co., Inc. Young & Company was employed by the vessel's operator to provide the loading services for the vessel.

VII.

Bryant's employer, Ayers Steamship Company, Inc., operates as a steamship agency and as a terminal operator. As a steamship agency, it has employees who necessarily board ocean-going vessels and perform portions of their duties on the navigable waters of the United States. As a terminal operator, Ayers receives cargo for eventual loading aboard a vessel and stores it in a pierside warehouse until space aboard a vessel is ready to receive it and until longshore labor is available to load the cargo. To perform its terminal operations in Galveston, Ayers employs cotton headers and quaymen from

Local 1308. Quaymen perform cargo shifting operations from one storage location to another storage location within the pierside warehouses, but they do not perform longshore work. Cotton headers and quaymen are not required to board ocean-going vessels nor to deliver cargo to them in the course of their duties and never work on vessels or on the navigable waters of the United States though much of their work will be performed adjacent thereto. The task of moving cargo from a pierside warehouse storage location to shipside for loading aboard a vessel is allocated jurisdictionally to the longshoring unions and is performed by longshoremen employed by stevedoring companies from the Galveston locals. Ayers itself does not perform any stevedoring services.

BRIEFING SCHEDULE

It is agreed that the Claimant will submit its Brief on or before November 15, 1973. The Employer's Insurance Carrier will file its Reply Brief on or before November 30, 1973. The Claimant will file a Reply Brief, if any, on or before December 17, 1973.

Executed by the Claimant and his attorneys on this the 17th day of October, 1973.

Executed by the Employer, Insurance Carrier and their attorneys on this the 24th day of September, 1973.

/s/ WILL BRYANT
Will Bryant, Claimant

DOWNMAN, JONES &
SCHECHTER

/s/ ARTHUR L. SCHECHTER
Arthur L. Schechter
Attorneys for Claimant

AYERS STEAMSHIP CO., INC.
/s/ ARLY J. BANQUER
Employer
TEXAS EMPLOYERS' IN-
SURANCE CORPORATION

/s/ WILL T. CARTER
Insurance Carrier
ROYSTON, RAYZOR, COOK &
VICKERY

/s/ E. D. VICKERY
Attorneys for Employer and
Insurance Carrier

DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION
PROGRAMS
GALVESTON, TEXAS

File No. 8-18217

WILL BRYANT
Claimant

v.

AYERS STEAMSHIP CO., INC., Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

SUPPLEMENTAL AGREED
STIPULATIONS OF FACT

Comes now Will Bryant, Claimant, and Ayers Steamship Co., Inc., employer and Texas Employers' Insurance Association, the insurance carrier in the above captioned and numbered cause and through their attorneys do make and enter into the following Stipulations of Fact, without prejudice to the rights of any party with respect to the jurisdictional issue or their rights to appeal on such issue:

I.

It is hereby stipulated and agreed that the Claimant, Will Bryant, on May 2, 1973, sustained an accidental injury in the course and scope of his employment for the Ayers Steamship Co., Inc. in the City of Galveston, Texas. It is further stipulated that Texas Employers' Insurance Association had in effect, subject to the resolu-

tion of the jurisdictional question in the above claim, Workmen's Compensation Insurance, covering employees of the Ayers Steamship Co., Inc.

II.

It is further stipulated and agreed that notice of injury was timely given, that claim for compensation was timely filed and that the employer and its insurance carrier have furnished such medical care and attention as the nature of the injury and the progress of recovery have required.

III.

It is further stipulated and agreed that during the year next preceding injury, the Claimant, Will Bryant, had an average weekly wage of $166.69, and his compensation rate under the Longshoremen's Act would be $111.13 per week; that following the injury in question, he sustained a period of temporary total disability from May 4, 1973 to June 29, 1973, a period of eight weeks, for which compensation under the Longshoremen's Act would amount to $889.04; that under the medical evidence in the case, the Claimant, Will Bryant, has a partial permanent disability of 10% to his right hand, for which compensation under the Longshoremen's Act would amount to 24.4 weeks at $111.13 per week in the total sum of $2,711.57; that the total amount of compensation owed if jurisdiction is determined to exist under the Longshoremen's Act for the injury of May 2, 1973 is $3,600.61.

IV.

It is further stipulated and agreed that the Insurance Carrier has paid to the Claimant compensation for temporary total disability for 8 weeks at the maximum weekly rate of $49.00 per week in the total sum of $392.00 under the Workmen's Compensation Act of Texas; that if jurisdiction is found to exist under the Longshoremen's Act, the Employer and Insurance Carrier are entitled to a credit in this amount against the agreed upon figures as to compensation under the Longshoremen's Act; that whatever additional compensation, if any, Claimant may be entitled to under the Texas Act if jurisdiction is found not to exist under the Longshoremen's Act will be determined after any party has exhausted .whatever appellate procedures they may take on the jurisdictional issue in this claim.

V.

It is further agreed that nothing in the agreed upon figures will in any way prejudice the right of the Claimant and his counsel to request that attorneys fees be assessed at the appropriate time against the carrier under the Longshoremen's and Harbor Workers' Compensation Act as amended.

Executed by the Claimant and his attorneys on the 13th day of December, 1973.

Executed by the Employer, Insurance Carrier and their attorneys on this the 13th day of December, 1973.

/s/ WILL BRYANT
Will Bryant, Claimant

DOWNMAN, JONES &
SCHECHTER

By /s/ ARTHUR SCHECHTER
Attorneys for Claimant

AYERS STEAMSHIP CO., INC.

By /s/ SELY J. BANQUER
Employer

TEXAS EMPLOYERS'
INSURANCE ASSOCIATION

By /s/ WILL T. CARTER
Insurance Carrier

ROYSTON, RAYZOR, COOK
& VICKERY

By /s/ E. D. VICKERY
Attorneys for Employer and
Insurance Carrier

DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION
PROGRAMS
GALVESTON, TEXAS

DOCKET NO. 74-LHCA-89
FILE NO. 8-18217

WILL BRYANT, Claimant

v.

AYERS STEAMSHIP CO., INC., Employer, and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Insurance Carrier

SUPPLEMENTAL AGREED STIPULATIONS OF FACT

At the request of the Honorable James G. Johnston, Associate Solicitor of Labor for Employee Benefits, the Claimant and the Employer and Insurance Carrier submit this Supplemental Agreed Statement of Facts and Stipulations, without either admitting or denying that they are material and/or relevant to the jurisdictional issue in this case, and agree as follows:

1.

Mr. Johnston's Question: "According to industry practice in the Port of Galveston, how frequently is the loading of cotton aboard ships carried out directly from

shoreside transportation, rather than from pierside warehouses into which it has previously been placed by cotton headers?"

Answer: Most of the time cotton is taken from pierside warehouses, though it is sometimes taken directly from shoreside transportation by longshoremen if the vessel on which it is to be shipped is waiting to be loaded.

2.

Mr. Johnston's Question: "If the ship which is to receive the cargo of cotton is docked for loading when the cotton arrives at the pier on dray wagons,

(a) are the pier facilities designed to allow the drays to pull alongside ship for direct transfer of the cotton aboard ship, or must the cotton be taken from the drays and carried through the pierside warehouse?

(b) to what extent is the cotton handled by cotton headers or quaymen?"

Answer: (a) The pier facilities are constructed in a manner which would permit dray wagons or highway motor trucks to pull alongside ship for direct transfer of the cotton aboard ship.

(b) If cotton comes to rest in the warehouse, it is placed there by cotton headers. If cotton does not come to rest in the warehouse, it is not handled at all by cotton headers, though if a vessel is waiting and cotton is taken from a dray on the apron of the pier by longshoremen to a waiting vessel, cotton headers who otherwise would have stored the cotton in the warehouse are paid for each bale so moved by the longshoremen.

3.

Mr. Johnston's Question: "When cotton is placed in a pierside warehouse by cotton headers to await the arrival of a ship, does the terminal operator keep track of the individual bales or lots of cotton, or are they placed in an unsegregated mass from which bales are removed for loading aboard ship without regard to origin?"

Answer: While awaiting the arrival of the ship, the cotton is stored in the warehouse by cotton headers employed by steamship agents such as the Employer herein who keeps track of the individual lots and they are not stored in the warehouse in an unsegregated mass.

4.

Mr. Johnston's Question: "What is the mean period of time, and what is the range of such periods, of 'storage' of cotton bales in pierside warehouses after being placed there by cotton headers for eventual loading aboard ship? Do storage charges accrue for cotton left in such warehouses?"

Answer: The period of time the stored cotton remains in a pierside warehouse after being stored there by cotton headers ranges from less than a day to several weeks. The Employer herein estimates the mean or average period of time as to its own operations to be approximately one week. After a certain numbers of day of "free time", storage charges accrue. At the warehouse in which claimant's injury occurred, "free time" was 15 days for cotton. Thus, almost all cotton is removed from the warehouse by the end of 15 days and of course, all cotton in the warehouse is eventually shipped out of the Port of Galveston by ship.

5.

Mr. Johnston's Question: "When the available labor force of I.L.A. Locals 329 and 851 has been exhausted and further longshoremen are needed to perform the work of those Locals, are members of Local 1308 hired to perform deep-sea longshoring work?"

Answer: Members of Local 1308, the cotton headers local, are as eligible as anyone else to be hired by Locals 329 and 851 when these deep-sea longshore locals have otherwise exhausted the labor force available to them. In fact, the Claimant Will Bryant has from time to time done such work but not for several years.

6.

Mr. Johnston's Question: "(a) Is the quotation of Deep-sea & Cotton Agreement Rule 20, in § 111 of the Agreed Statement of Facts and Stipulations filed herein, correct in placing the word 'or' between the phrases 'to and from pile or car' and 'to and from shipside or hatches'?

(b) If so, is cotton heading considered longshore work in that it is part of the process of ' * * * truck[ing] cargo direct to * * * pile * * * '?"

Answer: (a) No. The complete text of Rule 20 is quoted below:

> "Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ships, including hoisting cargoes with ships' winches, also including

> dinkey or jitney drivers, and loading of ship's stores except when stores are loaded by ship's crew and except at ports where longshoremen are not available. Longshore labor also includes all men who truck cargo direct to and from pile or car to or from the ship's side to hatches. The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. It is mutually agreed when assorting is necessary when discharging the employment of warehouse labor is optional.
>
> When vessel is in loading or unloading berth, or shifting between loading or unloading berths within the confines of a port, the loading and laying of dunnage and the opening and closing of hatches when in connection with the handling of general cargo and/or cotton, is longshore work and will not be done by ship's crew.
>
> The Employers reserve the right to determine by name from a list furnished by the Deep Sea Local Union those persons who will be qualified to be trained to operate Paceco or similar type cranes.
>
> The Employer will select the individual longshoreman by name from a list furnished by the Deep Sea Local Union to operate container machines."

(b) Not applicable.

7.

Mr. Johnston's Question: "Do cotton headers (and, particularly, did claimant Bryant) perform any functions other than transferring cotton from dray wagons, which have come from compress warehouses, to pierside warehouses? Do they move cotton from one location within a warehouse to another? Do they move it from one such warehouse to another? Do they work at any locations other than such pierside warehouses?"

Answer: The only function performed by cotton headers other than transferring cotton from dray wagons or trucks to pierside warehouses is the very infrequent performance of cotton shifting activities within a warehouse for purposes of consolidating the storage and conserving warehouse space. Cotton headers do not move cotton from one warehouse to another, although they may be employed to receive cotton into a warehouse from dray wagons which have come from other pierside warehouses. Cotton headers do not work at any location other than pierside warehouses.

8.

Mr. Johnston's Question: "Does Galveston industry practice recognize a general category of 'harbor workers'? If so, are cotton headers or quaymen considered to be within such general category?"

Answer: As the parties do not understand the question, no answer is made.

Executed by the Claimant and his attorneys on this the 3d day of May, 1974.

Executed by the Employer, Insurance Carrier and their attorneys on this the 7th day of May, 1974.

/s/ WILL BRYANT
Will Bryant, Claimant

DOWNMAN, JONES &
SCHECHTER

By /s/ ARTHUR SCHECHTER
Attorneys for Claimant

AYERS STEAMSHIP CO., INC.

By /s/ SELY J. BANQUER
Employer

TEXAS EMPLOYERS'
INSURANCE ASSOCIATION

By /s/ WILL T. CARTER
Insurance Carrier

ROYSTON, RAYZOR, COOK &
VICKERY

By /s/ E. D. VICKERY
Attorneys for Employer and
Insurance Carrier

U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

(SEAL)

Case No. 74-LHCA-89 (Formerly Case No. 8-18217)

In the Matter of

WILL BRYANT,
Claimant

v.

AYERS STEAMSHIP COMPANY,
Employer

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Carrier

Arthur L. Schecter, Esquire
Dowman, Jones & Schechter
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Houston, Texas 77002
For the Claimant

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Room 4221, Main Labor Building
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Washington, D.C. 20210
For Director
Office of Workmen's Compensation Programs

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as amended (hereinafter referred to as the Act). The sole issue for determination is jurisdiction, i.e., whether a cotton header, injured while unloading cotton bales from a dray wagon, is subject to the provisions of the Act. All facts, including disability and compensation due if Will Bryant (Claimant) is an employee covered by the Act as amended in 1972, have been stipulated by the parties.[1]

1. The parties have entered into three signed stipulations which are hereby incorporated as part of the record as follows:
Stipulation No. 1, entitled, "Agreed Statement of Facts and Stipulations", executed by Employer, Insurance Carrier and their attorneys on September 24, 1973, and by the Claimant and his attorney on October 7, 1973 (hereinafter referred to as "Stip. 1" followed by the appropriate page of that Stipulation).

A hearing was scheduled for June 4, 1974, in Houston, Texas, but was cancelled at the request of the parties.[2] A waiver of Oral Argument, duly signed by counsel for the parties was also filed and is hereby incorporated in the record as ALJ Exh. 2. By letter dated July 3, 1974, the parties, including the late Honorable James B. Johnston, were given confirmation of the telegraphic notice of cancellation of the notice of hearing; that the request of the parties that this case be submitted on the agreed stipulations of fact without formal hearing and/or oral argument was granted; and a briefing schedule was set forth. A copy of the letter dated June 3, 1974, is hereby incorporated in the record as ALJ Exh. 3.

Claimant initially filed a brief with the Deputy Commissioner entitled, "Brief and Argument in Support of Will Bryant's Claim for Compensation" and Employer-

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Stipulation No. 2, entitled, "Supplemental Agreed Stipulation of Fact", executed by Employer, Insurance Carrier and their attorneys on December 13, 1973, and by Claimant and his attorney on December 13, 1973 (hereinafter referred to as "Stip. 2" followed by the appropriate page of that Stipulation).

Stipulation No. 3, also entitled "Supplemental Agreed Stipulation of Fact", executed by Claimant and his attorney on May 3, 1974, and by Employer, Insurance Carrier and their attorneys on May 7, 1974 (hereinafter referred to as "Stip. 3" followed by the appropriate page of that Stipulation).

2. The late Honorable James G. Johnston, Associate Solocitor for Employee Benefits, in a letter to the undersigned dated May 24, 1974, with copies to counsel for the parties, concurred that the three stipulations, more fully described in n. 1, *supra*, "set forth all relevant facts of which we are aware with respect to the claim; none of us desires to adduce any further evidence. Thus on behalf of all parties, we would like to waive, pursuant to 20 C.F.R. § 702.346, the formal hearing which has been scheduled to be held in Houston on June 6, 1974." The letter dated May 24, 1974, is hereby incorporated in the record as ALJ Exh. 1.

Carrier filed a brief with the Deputy Commissioner entitled "Brief of Employer and Insurance Carrier", received December 27, 1973. Thereafter, Employer and Insurance Carrier filed with this Office a Motion to Dismiss and/or for Summary Judgment for Lack of Jurisdiction, hereby incorporated in the record as ALJ Exh. 4. Pursuant to the briefing schedule set forth in ALJ Exh. 3, the Director timely filed a brief entitled "Memorandum of the Director, Office of Workmen's Compensation Programs, in opposition to Employer's and Insurance Carrier's Motion to Dismiss and/or For Summary Judgment". Counsel for Claimant, by letter dated June 13, 1974, addressed to the undersigned, (hereby incorporated in the record as ALJ Exh. 5), advised that Claimant did not wish to file any additional briefs; however, counsel for Claimant by letter dated July 11, 1974, addressed to the undersigned (hereby incorporated in the record as ALJ Exh. 6) set forth the amount claimed as an attorney's fee and medical expenses supported by his signed statement of time and work (hereby incorporated in the record as ALJ Exh. 6-A). Employer and Carrier timely submitted a Reply Brief, dated July 5, 1974. Employer and Carrier by letter dated July 30, 1974, responded to Claimant's counsel's letter of July 11, 1974 (hereby incorporated in the record as ALJ Exh. 7) with regard to attorney's fee and medical expenses. By letter dated February 3, 1975, counsel for Employer-Carrier submitted a copy of a brief filed in BRB No. 74-191-191A, *Diverson Ford v. P. C. Pfeiffer Company, Inc., et al.*, which is hereby rejected as not timely filed.

On the basis of the stipulations of the parties and the briefs and memoranda filed herein, I make the following findings, conclusions and order.

Findings of Fact

The facts are fully set forth in the Stipulations of the parties and the pertinent facts are summarized as follows:

1. Employer, Ayers Steamship Co., is a ship agency and a terminal operator and does not employ longshoremen to load or unload vessels (Stip. 1, pp. 3, 4). As a ship agency, Employer has employees who board ocean-going vessels and perform some duties on the navigable waters of the United States (Stip. 1, p. 4). As a terminal operator, Employer receives cargo for eventual loading aboard a vessel and stores it in a pierside warehouse until space aboard a vessel is ready to receive it and until longshore labor is available to load the cargo (Stip. 1, p. 4).

2. To perform its terminal operations in Galveston, Employer employs cotton headers and quaymen from Local 1308 (Stip. 1, p. 4). Local 1308 is the ILA cotton headers local (Stip. 3, p. 3). Cotton headers are employed solely to unload cotton bales from shoreside transportation and to store it in pierside warehouses. Cotton headers never move the bales from the pile (warehouse) to the ship (Stip. 1, p. 2). Quaymen perform cargo shifting operations from one storage location to another storage location within the pierside warehouses, but they do not perform longshore work. Cotton headers and quaymen do not deliver cargo to vessels and never work on vessels or on the navigable waters of the United States (Stip. 1, pp. 4-5).

3. Claimant, for five or six years prior to May 2, 1973, had worked exclusively as a cotton header or

quayman out of Local 1308; Claimant has done no longshoring work; and Claimant's work has on no occasion required him to go aboard a vessel on the navigable waters of the United States (Stip. 1, pp. 1, 3)

4. On May 2, 1973, Claimant, while employed by Employer as a cotton header at a warehouse immediately adjacent to Pier 23, Port of Galveston, Texas, sustained a fracture of the 5th Metacarpal bone in his right hand and other injuries to his right hand when, as he was unloading a bale of cotton, a "spider" from the banding on the bale caught his glove and pulled him along with the rolling bale so that his right hand was caught between two bales (Stip. 1, pp. 1, 2).

5. The driver of the dray wagon, an employee of Bluebonnet Warehouse, who had brought the dray wagon to the warehouse, was assisting Claimant unload the bales when Claimant was injured (Stip. 1, p. 2).

6. In the Port of Galveston, cotton is received by various shoreside cotton compress/warehouses from inland shippers. The cotton is then drayed to pier warehouses, the driver of the dray, together with two cotton headers take the cotton off the dray wagon and move it to the designated place in the pier warehouse (Stip. 1, p. 1). The cotton remains stored in the warehouse until it is moved by longshoremen, not cotton headers, to shipside. After the cotton headers take the cotton off the dray wagons and put it to rest in the warehouse, they do not load it again (Stip. 1, p. 2), unless the cotton is removed from that warehouse and stored in another warehouse (Stip. 1, p. 4), in which event, although cotton headers do not move cotton from one warehouse to another, they may be employed, as cotton

headers, to receive cotton into the other warehouse from dray wagons which have come from another pierside warehouse. Cotton headers do not work at any location other than pierside warehouses (Stip. 3, pp. 4-5).

7. The cotton on which Claimant was working when injured was stored in anticipation of the arrival of the SS KOREAN EXPORTER which was not in port at the time and did not arrive at the dock until May 7, 1973. The cotton which Claimant was actually heading at the time of his injury on May 2, 1973, was, in fact, loaded aboard the KOREAN EXPORTER by longshoremen on May 7, 1973. The loading of the KOREAN EXPORTER was accomplished by longshoremen employed by Young & Company, an independent contracting stevedoring company in no way affiliated with Employer. Young & Company was employed by the vessel's operator (Stip 1, pp. 3-4).

8. The Deepsea and Cotton Agreement Rule 20, which defines longshore work, provides, in part, as follows:

> "Longshore work shall constitute the loading and discharging of all sea-going vessels . . . and all labor connected with the loading and discharging of ships . . . Longshore labor also includes all men who truck cargo direct to and from pile or car or to and from the ship's side to hatches. The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. It is mutually agreed that when assorting is necessary when discharging the employment of warehouse labor is optional.
>
> . . ." (Stip. 3, pp. 3-4)

9. The Cotton Headers Union Contract provides:

> "It is recognized and agreed that breaking down cotton stacked for loading aboard ship is longshore work." (Stip. 1, p. 2).

10. It is possible that cotton can be transferred directly from dray wagon to ship, in which event the work would be done by longshoremen; however, if this is done, cotton headers who otherwise would have stored the cotton in the warehouse must be paid for each bale so handled by the longshoremen (Stip. 3, p. 2).

11. Cotton stored in the warehouse by cotton headers is segregated by lot (Stip. 3, p. 2); may remain in storage for periods ranging from less than a day to several weeks; each warehouse allows a certain number of days of "free time" after which storage charges accrue. At the warehouse in which Claimant's injury occurred, "free time" for cotton was 15 days (Stip. 3, p. 3).

12. Claimant's average weekly wage was $166.69. Following the injury in question, Claimant was temporarily totally disabled from May 4, 1973, to June 29, 1973, a period of eight weeks, for which compensation under the Act would be $889.04; that, in addition, Claimant has suffered a permanent partial disability to his right hand from June 30, 1973, for which he would be due compensation under the Act for a further period of 24.4 weeks in the total sum of $2,711.57; and that the total amount of compensation owed if jurisdiction is determined to exist under the Act is $3,600.61 (Stip. 2, p. 2), not including, however, $158.00 of medical expenses claimed by Claimant's attorney (ALJ Exh. 6-A) to which Employer-Carrier have noted an objection (ALJ Exh. 7).

13. Carrier has paid Claimant compensation for temporary total disability for eight weeks at the maximum weekly rate under the Workmen's Compensation Act of Texas; that if jurisdiction is found to exist under the Act, Employer-Carrier are entitled to a credit of the amount of State compensation paid; that whatever additional compensation, if any, Claimant may be entitled under the State compensation act if jurisdiction is found not to exist under the Act will be determined after final decision in this case (Stip. 2, p. 2).

14. Timely notice of injury was given; claim for compensation under the Act was timely filed; and Employer-Carrier have furnished such medical care and attention as the nature of injury required (Stip. 2, p. 1).

Conclusions

Claimant performed no work on navigable waters and was injured in a warehouse on the land. Clearly, prior to the 1972 amendments of the Act he would not have been covered by the Act. *Nacirema Operating Co., Inc. v. Johnson,* 396 U.S. 212 (1969).

Employer has employees who are employed in maritime employment upon the navigable waters of the United States and is, therefore, an "employer" within the meaning of Section 2(4) of the Act; but a claim is no longer covered by the Act merely because the employer has other employees employed in maritime employment and the injury occurred upon "navigable waters". Coverage under the Act now requires that the employee, himself, be a person engaged in maritime employment, as very succinctly and very correctly stated by the Solicitor in his brief as follows:

> "An injured claimant now must meet that definition, [of employee § 2(3)] or his injury will not fall within the terms of § 3(a); he may no longer rely on the fact that *other* persons working for his employer are doing maritime work.
>
> "In the absence of this new 'status' requirement, the Act would have reached injuries on land to persons whose employment involved no maritime function; such injuries, however, are not maritime subjects at all. The purpose of the limitation of coverage to persons 'engaged in maritime employment' was thus to restrict the Act's application to subjects within the Federal admiralty powers." (Memorandum of Director, p. 4).[3]

Claimant was not a longshoreman; he did not load vessels. He was a cotton header, or warehouseman; his

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3. Liability prior to the amendment of Section 2(3) of the Act, in cases such as *Peter v. Arrien,* 325 F. Supp. 1361 (E.D. Pa.), *aff'd,* 463 F.2d 252 (3rd Cir. 1972), was predicated on the definition of "employer" in § 2(4) as ". . . an employer any of whose employees are employed in maritime employment . . . upon the navigable waters . . .", the absence of any definition of "employee"—except certain persons not included "in the term, and the provision of § 3(a) which provided,

> "Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . ."

Coverage was established if the disability or death occurred on navigable waters even if the decedent or disablee was not engaged in maritime employment, if the employer had some employees employed in maritime employment. *Gilmore v. Weyerhaeuser Company,* BRB No. 74-141. However, Section 2(3) of the Act, as amended, now defines the term "employee" as,

> ". . . any person engaged in maritime employment . . ."

Consequently, this term "employee" in § 3(a) of the Act now means a person engaged in maritime employment, i.e., even if disability or death occurs on navigable waters, such disability or death would be covered under § 3(a) only if that employee were engaged in maritime employment.

duties as a cotton header consisted solely of unloading bales of cotton from dray wagons and storing the bales of cotton in segregated lots in the warehouse or, possibly, on rare occasions moving bales of cotton from one location to another within the same warehouse. On other occasions, Claimant worked as a quayman in moving cotton bales from one warehouse to another warehouse. Claimant was injured at a warehouse "immediately adjacent",[4] but not adjoining, Pier 23, Port of Galveston, Texas.

The warehouses at which cotton headers work are also described as "pierside" and the cotton bales are brought to such pierside warehouses with the express intention that the cotton will be shipped in maritime commerce aboard sea-going vessels. Nevertheless, Claimant's duty as a cotton header was to store the cotton bales in the warehouse. The cotton bales come to rest in the warehouse. The movement from the warehouse, or "pile" to dockside is performed by longshoremen. The Union agreements draw a hard, but clear, line of demarcation between warehouse, or cotton header, work on the one hand and longshore work on the other. Longshore work begins at the warehouse, or "pile" to dockside and loading aboard a vessel; warehouse, or cotton header, work

4. The dictionary definition of "adjacent" is
"Lying near, close, or contiguous; neighboring; bordering on; as a field adjacent to the highway." Webster's New International Dictionary, 2nd Ed. (1958)

or

"Lying near or close to; sometimes, contiguous; neighboring . . . Adjacent implies that the two objects are not widely separated, though they may not actually touch . . . while adjoining imparts that they are so joined or united to each other that no third object intervenes." Black's Law Dictionary, Revised 4th Ed. (1968)

extends to the storage of the cotton bales in the warehouse, or "pile", shifting of cotton bales within a warehouse. Rule 20 of the Deepsea and Cotton Agreement, which defines longshore work, expresses it as follows:

> ". . . Longshore labor also includes all men who truck cargo direct to and from pile . . . The important distinction being whether or not the freight is handled once, that is to say, laid down or piled . . ."

The Cotton Headers Union Contract provides that,

> ". . . breaking down cotton stacked for loading aboard ship is longshore work."

Under the Galveston Union contract, cotton bales must be handled twice, that is, must be laid down or piled before moving to the ship's side or cotton headers, who otherwise would have laid down, or piled, the cotton must be paid for each bale so handled by the longshoreman.

Section 2(3) of the Act, as amended, defines employee as follows:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ."

Section 3(a) of the Act, as amended, specifies the coverage of the Act as follows:

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but

only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

Claimant was not a longshoreman and he was not engaged in longshoring operations; he was not injured upon the navigable waters nor on any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. Was he, nevertheless, as contended by the Solicitor, engaged in maritime employment?

Neither S. 2318 [July 20 (legislative day, July 19, 1971)] nor S. 525, [February 2, (legislative day, January 26, 1971)] on which the Hearings were held [Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearing before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess. (1972)] proposed any change in coverage or amendment of Sections 2(3) or 3(a) of the Act so that scant attention was given in the Hearing to any question of coverage or jurisdiction. The following comments relating to the matter have been noted:

"Senator Javits. . . .

"Lastly, Mr. Secretary, I understand that there is also some controversy about work over land and work over water, and there has been quite a good deal of litigation. Would you have any suggestion as to how we could deal with that subject?

"Secretary Hodgson. I had thought that through years of court cases on this that that thing had been somewhat narrowed, that question under that had been somewhat narrowed.

"I don't know how we could improve that differentiation, but I would be willing to examine whether or not we could.

"I would like to see if Mr. Schubert has any comments on that.

"Mr. Schubert. Well, the latest case to draw a line was the Nacirema case, and it drew the line between the ship and the plank and the land on which the dock was located. It seems to me that it is inevitable that a line be drawn somewhere. It is just a matter of judgment as to the most appropriate geographical place.

"I think that we certainly could work with staff in coming up with a more rational and reasonable line. I am always apprehensive that we open the door to more litigation, but we certainly would be delighted to look at it, as we have been in the preparation for these hearings.

"Senator Javits. Thank you very much. I think that the willingness of the Department to examine these questions with an open mind is very gratifying, and I am hopeful that we can have a collaboration that will be constructive." (Hearings, pp. 38-39)

"Mr. Mittelman. One other question, and that concerns the reach of a Longshore Act as proposed, its relationship to the State act. Concerning the water's edge, how does that apply to a ship repair yard? I think I understand pretty well how it applies to customary longshore situations. I am not quite clear how a shipyard is set up.

"Mr. Hartman. Same thing.

"Mr. Mittelman. Is most of the work actually performed over navigable waters, or is a lot of it performed on dry land?

"Mr. Hartman. In an average ship repair yard, I don't know, I guess it would be 60 or 65 percent, depending on whether it is a conversion, or if it is a repair of a damage at sea, but, on the average, I would say 65 or 70 percent of the work in a standard repair yard is performed aboard the vessel, afloat in navigable waters or in drydock.

"Mr. Mittelman. Would you see any virtue, or it is in fact feasible to have the same rule apply as far as compensation goes? In other words, to extend the Longshore Act to all ship repair work performed over the water or contiguous to it, in proximity to it, so that you do not get this duality of benefits, I mean, particularly as we amend this law as you propose, it is going to be much better than of the State laws, so there will be quite a difference in benefits, depending on which side of that water's edge the ship repairman in your case is entered.

"Mr. Hartman. I am not authorized to speak for the shipbuilding industry. I can respond personally to that question, and for my own company, and tell you that we would see no objection, we would interpose no objection, to extending the Longshoremen's Act to the landbased facility of the ship repair yard.

"Mr. Mittelman. That is very helpful to know that. Thank you." (Hearings, pp. 76-177)

Mr. Davis B. Kaplan, Chairman of Admiralty Section, American Trial Lawyers Association, excerpt from prepared statement, entitled "An Analysis of Senate Bill 525."

"The maritime worker, whether he be crewmember or longshoreman, is obligated to perform his employment on a ship which he has no familiarity with, nor control over and with equipment generally supplied by the ship . . . (Hearings, p. 363)

* * * * *

"It is also of some importance, it seems to us, that most shoreside workers can and do exercise some control over the area in which and the tools with which they work. This is not true of longshoremen. They must work, if they are to work at all, in and on areas supplied by a total stranger over whom they exercise no control. They must accept the area and tools of work as they find them or refuse to work. Because of the hazardous nature of the work, the rights and obligations of the people involved have been molded by the legislature and by our courts in order to harmonize the divergent interests. On the one hand the marine worker must perform his work under severe circumstances so the correlative duty of the shipowner is to provide a reasonably safe place for the worker to perform his activity." (Hearings, p. 368).

In an amendment reported by Senator Eagleton on September 13, 1972, the original provisions of S.2318 were stricken and extensively revised provisions were substituted. S.2318, as amended was accompanied by S. Rep. 92-1125, 92nd Cong., 2nd Sess. (Sept. 14, 1973). See, Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess., December, 1972 (References to the Legislative History, "Leg. History" will be identified as to source followed by the page of the

Legislative History volume and, where applicable, the page of the Report).

S. Rep. 92-1125 with respect to the extension of coverage stated, in part, as follows:

> "The bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work." (Rep. p. 2, Leg. History p. 64).
>
> * * * * *
>
> "Extension of Coverage to Shoreside Areas
>
> "The present Act, insofar as longshoremen and shipbuilders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs." (Rep. p. 12, Leg. Hist. p. 74)
>
> * * * * *
>
> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

> "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.
>
> "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, the employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise

the Committee has no intention of extending the coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." (Rep. p. 13, Leg. Hist. p. 75)

H. R. 12006, initially introduced by Congressman Daniels on December 2, 1971, was amended September 25, 1972, by striking out all of the original proposals and substituting provisions identical to those contained in S. 2318, as amended, and H. R. 12006, as amended, was accompanied by H. R. Rep. 92-1441 which, as pertains to the extension of coverage, is substantially identical to S. Rep. 92-1125 (See, for example, Rep. pp. 10-11, Leg. Hist. pp. 216-217).

"We do not believe that the compensation payable to a longshoreman or harbor worker should depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, section 2 of our bill amends the act to provide coverage of longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment—excluding masters and members of the crew of a vessel—if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading; unloading; repairing; or building a vessel." (Statement, Cong. Daniels, Leg. Hist. p. 287)

QUESTIONS AND ANSWERS

"Question. The present law covers employees working on navigable waters. Do the amendments change the scope of coverage?

"Answer. Yes. The present law's coverage is limited to employees working on navigable waters, including those working on dry docks. The amendments will extend coverage to wharfs, terminals, marine railways and other adjoining areas customarily used in building, repairing, loading, or unloading vessels. Also, the definition of "employee" is clarified by the amendments.

"The latter change was made so that a determination of coverage can be made on the basis of the definition of "employee." Under the present law that definition is so vague that the determination must be made on the basis of whether the injured individual was working for a covered "employer." The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it." (Submitted during floor debate by Cong. Steiger. Leg. Hist. p. 298).

[From the Congressional Record—Senate, Oct. 18, 1972]

LONGSHORMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

Mr. Eagleton. . . .

"Significant improvements in the act are also made in the area of extended coverage, by extending

coverage to injuries occurring in the contiguous dock area related to longshore and ship repair work. . . ." (Leg. Hist. p. 383).

Reasonable minds may differ as to intent of Congress as evidenced by the Legislative History provided for, like the Bible, it can be read to support quite divergent views. Bearing in mind the admonition of a former professor that "the Bible has suffered from inattention to what is said and the manner in which it is expressed", which admonition is equally applicable to conclusions as to presumed Congressional intent, it must be noted: a) in the course of the Senate Hearings, Senator Javits raised the question of work over land and work over water to which Secretary of Labor Hodgson and Solicitor of Labor Schubert responded. Mr. Schubert stated that the latest case to draw the jurisdictional line was the *Nacirema* case. He further stated, "It seems to me that it is inevitable that a line be drawn somewhere. It is just a matter of judgment as to the most appropriate geographic place."; b) minority counsel Mittelman raised the question of extension of the Act to all ship repair work, to which Mr. Ralph Hartman responded that his own company ". . . would interpose no objection to extending the Longshoremen's Act to the land-based facility of the ship repair yard."; c) "maritime worker" was discussed as "crewmember or longshoreman" and special significance was placed on fact that ". . . most shoreside workers can and do exercise some control over the area in which and the tools with which they work. This is not true of longshoremen."; d) Senate Report 92-1125 states at the outset that "The bill also expands coverage of this Act to cover injuries occurring in the contiguous dock area *related to longshore* and ship repair

work." (Emphasis supplied); and Senator Eagleton, who reported the amendment to S. 2318, repeated the same statement in his statement on October 18, 1972; f) Senate Report 92-1125 and House Report 92-1441, make it clear that the primary concern, vis-a-vis loading and unloading, was that the longshoremen be covered whether the work be over water or on the land and stated, "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. *The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.*" (Emphasis supplied); and g) Congressman Steiger, in his Questions and Answers, stated, "The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. *Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harbor worker, whether engaged in repairing a vessel or unloading it.*" (Emphasis supplied)

Coverage under the Act has never been, and is not now, governed by engagement in maritime commerce.

From the foregoing, I conclude that Congress extended coverage only to the point on such pier, wharf, or terminal adjoining navigable waters, that the longshoring operation, i.e., the loading of a vessel, begins and that the extension of coverage ceases when the longshoring operation ceases when placement of the cargo on such pier, wharf, or terminal adjoining navigable waters. No other conclusion is consistent with the language of § 2 (3) of the Act "longshoreman or other person engaged in longshoring operations" and the expressed Congressional intent that the extended coverage apply to, "The employees who perform this [longshoring] work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area" *but specifically would not cover* "employees who are not engaged in loading, unloading, or repairing a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

Claimant was not a longshoreman; he did not perform longshoring operations; and the bales came to rest in the pile, or warehouse, before the longshoring operation began. That cotton headers are not persons customarily considered to be working in the longshoring business is firmly established, not only by custom and practice in the industry in the Port of Galveston, but also by the agreement of the Cotton Header Union, under which Claimant worked, as well as by Rule 20 of the Deepsea and Cotton Agreement. It is true, of course, that placement of the cotton bales in the pile was the last step before commencement of the loading, or longshoring operation; that the cotton was brought to pierside warehouses in expectation that it would be loaded aboard sea-going vessels; and, indeed, that longshoremen take

the bales, stored by cotton headers, from the pile to dockside and load the bales in the vessels. Nevertheless, Claimant's work does not involve loading a vessel and is not a longshoring operation and, as pertains to this case, Claimant is not, therefore, engaged in maritime employment within the meaning of Section 2(3) of the Act.[5] Stated otherwise, the movement of cargo does not become a maritime employment within the contemplation of Section 2(3) of the Act until the longshoring operation begins. In this case, Claimant's work ceased and the cargo came to rest in the warehouse before the longshoring operation began. Accordingly, Claimant is not subject to the coverage of the Act.

This conclusion is consistent with the decisions of the Benefits Review Board construing the Act, or at least, is not irreconcilable with the decisions of the Benefits Review Board construing the Act. *William T. Adkins v. I.T.O. Corporation of Baltimore,* BRB NO. 74-123 (1974), involved an injury while loading stripped cargo into trucks for further movement. Although the Board affirmed the finding of the administrative law judge that the injury occurred while the cargo was still in maritime commerce, which, with all deference, is not a proper criteria of coverage within the meaning of the Act; nevertheless, the Board held that, "The Claimant was performing the first and last in a series of longshoring operations thereby bringing him within the scope of

5. Obviously, the extension of coverage brings within the protection of the Act persons engaged in maritime employment who are harbor workers, even though they are not longshoremen, nor ship repairmen, nor shipbuilders, nor shipbreakers. For example, a line tender, whose duties consist of the docking and undocking sea-going vessels, is engaged in maritime employment even if his duties are performed on the dock.

maritime employment." Here, the longshoring operation began after Claimant stored the cotton in the warehouse.

Dominick Coppolino v. International Terminal Operating Company, Inc., BRB No. 74-136 (1974), involved a foreman of longshoring and hiring agent who was injured while replacing paper in an IBM machine located in a building on the pier. The Board held that, "The fact that at the time of injury he was engaged in a clerical function necessary to the performance of his job does not remove him from the sphere of longshoring operation, nor from coverage under the Act." *Herbert L. Perdue v. Jacksonville Shipyards, Inc.*, BRB No. 74-200 (1975), involved injury to a shipfitter which occurred when he disembarked from a company bus in order to "punch out". The point of injury was about one mile by land from the ship on which he was working but still within the naval station. The Board held that the "claimant is entitled to coverage under the Act." Both in *Coppolino* and *Perdue* the Board was confronted with injuries to persons clearly covered by the Act in their regular employment, where the injury occurred in the course of employment but at a time when they were not engaged in their regular covered employment. Here, of course, Claimant was not a longshoreman and was not engaged in a longshoring operation so that the "course of employment" rationale is not applicable.

Giacomo Avvento v. Hellenic Lines, Ltd., BRB. No. 74-153 (1974), involved an injury while loading cargo onto a truck parked on the pier. The Board held, "This was a final step in the unloading process. . . ." As noted above, the loading, or longshoring, operation in this case began after the completion of Claimant's work.

Donald D. Brown v. Maritime Terminals, Inc., 74-177 and 74-177A (1974), involved an injury while "stuffing" cargo into a shipping container in a warehouse. The Board held that, ". . . the claimant was injured while within the scope of coverages as enlarged by the 1972 amendments to the Act. . . ." There, in accordance with union jurisdictional claims and industry practice, the longshoring operation began with the stuffing of containers. Here, of course, in accordance with union agreements, jurisdictional claims and industry practice the longshoring operation began with removal of the cotton bales from the pile, i.e., Claimant's work ceased before the longshoring operation began.

In view of the language carefully chosen by Congress, Claimant was not injured on an adjoining pier, wharf or terminal, but see, *William T. Adkins v. I.T.O. Corporation of Baltimore, supra;* however, even if he were, Congress stated that the Act was not intended to cover "employees who are not engaged in loading, unloading, or repairing a vessel, just because they are injured in an area adjoining navigable waters used for such activity." Claimant was not, in any event, engaged in loading, unloading, or repairing a vessel.

Finally, the Solicitor states that

> ". . . employees who only deliver cargo to . . .[6] 'storage' facilities—like the driver of the cotton dray, an employee not of Ayers but of Bluebonnet Warehouse, who assisted Bryant [Claimant] and another cotton header in unloading the cotton from the dray wagons . . . are not covered by the Act." (Memorandum of Director, p. 7).

6. The phrase, "on-pier" is clearly in error and has been omitted.

Claimant, as well as the driver of the cotton dray, merely delivered cargo to storage facilities. Although this brought the cargo to a "pierside" point, Claimant's work was a warehousing function and the longshoring operation began after completion of the warehousing operation. Indeed, until the longshoring operation began the cotton was subject to movement to other warehouses. The line of demarcation between warehousing on the one hand and longshoring on the other was clearly and emphatically set forth in the Union agreements. The example given in Senate Report 92-1125 and in House Report 92-1441 that the extension of coverage goes to the point that the cargo comes to rest on the pier, wharf or terminal adjoining navigable waters necessarily means that the extension of coverage in unloading cargo ends at that point and conversely, the extension of coverage in loading begins when the longshoring operation begins. As noted above, it is fully recognized that the Benefits Review Board, consistent with industry practice, has held that the Act extends to "stuffing" or "unstuffing" of containers because that is the point that the longshoring operation begins or ends. But here, the industry practice and the applicable union contracts quite specifically provide that the longshoring operation begins with the removal of the cotton bales from the pile, or warehouse, and the longshoring operation ends with the placement of the cotton bales in the pile, or warehouse. Claimant was not engaged in loading a vessel and, hence, was not engaged in maritime employment at the time of injury. *Kenneth E. Powell v. Cargill, Inc.*, 74-LHCA-172 (1974); *John A. Richardson v. Great Lake Storage & Contracting Co.*, 74-LHCA-223 (1974). The presumption of Section 20 is self limiting, i.e., "in the absence

of substantial evidence to the contrary"; has no quality of affirmative evidence, *John W. McGrath Corporation v. Hughes*, 264 F.2d 314, 317 (2nd Cir. 1959); "Its only office is to control the result where there is an entire lack of competent evidence." *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); and as to jurisdiction does not become effective until jurisdiction is first affirmatively established and only then does the coverage presumption become effective. *Atlantic Stevedoring Company, Inc. v. O'Keefe*, 220 F.Supp. 881 (S.D. Ga. 1963) *rev'd on other grounds*, 354 F.2d 48 (5th Cir. 1965); *Employers Mutual Liability Insurance Company of Wisconsin v. Arrien*, 244 F.Supp. 110 (N.D. N.Y. 1965) Employer-Carrier have come forward with substantial stipulated evidence and even a liberal construction may not be employed to frustrate the Congressional intent as evidenced by the new definition of "employee", the Committee Reports and the related legislative history. *Diverson Ford v. P. C. Pfeiffer Company*, 74-LHCA-181 (1974).

The exclusion of the driver of the dray wagon from coverage, as conceded by the Solicitor, in the event of injury while working with the cotton headers in unloading bales from the dray wagons and storing the bales in the warehouse would perpetuate the disparity in benefits payable to employees performing the same job; but, if Claimant were otherwise covered by the Act, the non-coverage of a fellow employee could not deprive an employee otherwise covered of the benefits of the Act. Cf., driver of truck in *Giacomo Avvento v. Hellenic Lines, Ltd*, BRB No. 74-153 (1974).

For the foregoing reasons, Claimant was not an employee within the meaning of Section 2(3) of the Act

and compensation for his injury is not within the coverage of Section 3(a) of the Act. Accordingly, Employer and Carrier's Motion to Dismiss for lack of jurisdiction will be granted and Claimant's claim will be denied as not within the coverage of the Act. In view of the denial of the claim for compensation, the further claim of Claimant's attorney for the allowance of an attorney's fee, medical expenses and costs must also be denied. *Director Office of Workmen's Compensation Programs v. Hemingway Transport, Inc.*, BRB No. 74-129 (1974); *John Karacostas, Sr. v. Port Stevedoring Company, Inc.*, BRB No. 74-176 (1974); *Leo F. Baum v. Jacksonville Shipyards, Inc.*, 74-LHCA-88, *aff'd* BRB No. 74-110 (1974).

ORDER

The Claim of Claimant, Will Bryant, be, and the same is hereby, dismissed for lack of jurisdiction.

The claim of Claimant's attorney for allowance of an attorney's fee, medical expenses and costs be, and the same are hereby, dismissed for lack of jurisdiction.

/s/ WILLIAM B. DEVANEY
William B. Devaney
Administrative Law Judge

Dated: February 28, 1975
Washington, D.C.

(Jurat Omitted in Printing)

U. S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

(SEAL)

BRB Nos. 75-137 and 75-137A

WILL BRYANT, Claimant-Petitioner

v.

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner

Appeal from Decision and Order of William B. Devaney, Administrative Law Judge, United States Department of Labor.

Arthur L. Schechter (Downman, Jones & Schechter) Houston, Texas, for the claimant.

E. D. Vickery, W. Robins Brice (Royston, Rayzor, Cook & Vickery), Houston, Texas, for the employer/carrier.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

DECISION

Miller, Member:

These appeals by the claimant and by the Director, Office of Workers' Compensation Programs (hereafter, the Director), are from a Decision and Order (74-LHCA-89) of Administrative Law Judge William B. DeVaney, in which he found lack of jurisdiction over this claim for compensation, filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereafter referred to as the Act).

All pertinent facts, including degree of disability and amount of compensation due if the claimant were found to be subject to the Act, were stipulated by the parties. All parties waived formal hearing and oral argument and agreed that the case be submitted for decision on the agreed stipulations of fact. The administrative law judge found the sole issue for determination to be "jurisdiction", specifically, whether or not a cotton header, injured while unloading cotton bales from a dray inside a pier-side warehouse, is subject to the provisions of the Act. The administrative law judge determined that the "claimant was not an 'employee' within the meaning of Section 2(3) of the Act and compensation for his injury is not within the coverage of Section 3(a) of the Act". 33 U.S.C. §§ 902(3), 903(a). Therefore, he dismissed the claim for lack of jurisdiction. From this denial of compensation, both the claimant and the Director appeal.

The employer is a ship agency and terminal operator. As a terminal operator, it receives cargo for temporary

storage in a pier-side warehouse. Cotton bales are held in such a warehouse for periods averaging one week, then moved out and placed on board a vessel. The company does not provide stevedoring services to ships, but rather contracts with other companies to move cargo to or from the warehouse and ships.

The claimant was employed as a cotton header. His duties were to assist another cotton header and the driver of the dray in unloading bales of cotton from the dray and placing them in a warehouse located immediately adjacent to Pier 23 at Galveston, Texas. The claimant's duties never required him to assist in moving cargo from a warehouse to a ship or to work on board a vessel, but on occasion he did participate in movement of cargo from one warehouse to another. On May 2, 1973, the claimant injured his right hand while unloading bales of cotton from a dray.

The jurisdictional requirements of the Act are embodied in Sections 2(3), 2(4) and 3(a). 33 U.S.C. §§ 902(3), 902(4) and 903(a). There is no dispute that the employer is an "employer" as defined in Section 2(4). The parties stipulated that the claimant's accident occurred in a warehouse immediately adjacent to a pier which adjoins navigable waters. This is an apparent concession that the injury was sustained in a geographic area within the "situs" jurisdiction of Section 3(a). However, in his Decision and Order, the administrative law judge found that the injury in this case did not come within Section 3(a) coverage.

Although the parties apparently stipulated that the claimant sustained his injury within the geographic reach of the Act, such a stipulation is not binding on the

fact-finder. *California Ship Service Co. v. Pillsbury*, 175 F.2d 873 (9th Cir. 1949). While the parties did not address Section 3(a) in their written submissions to the administrative law judge, he nevertheless rejected the apparent concession that the "situs" requirement of jurisdiction was met and found that this claim is not within the coverage of Section 3(a) of the Act. This conclusion is erroneous.

There is little evidence in the record of the geographic relationship between the site of the warehouse where the claimant was injured and navigable waters. Nevertheless, it is clear from the record that the employer is a terminal operator; that the claimant's accident occurred in a warehouse immediately adjacent to Pier 23; that the pier adjoins navigable waters of the United States; that this pier-side warehouse is used for the temporary storage of cotton prior to loading a ship; and that usually cotton is taken directly from that warehouse to a ship and loaded aboard. Given these facts, stipulated by the parties, and found by the administrative law judge, his conclusion that the claimant was "not injured upon the navigable waters nor on any adjoining pier, wharf, dry dock, *terminal*, building way, marine railway, or *other adjoining area customarily used by an employer in loading*, unloading, repairing, or building *a vessel*" (emphasis added) is clearly erroneous as a matter of law. The clear language of Section 3(a) includes the pierside warehouse where this claimant was injured.

The issue most strenuously pursued before the administrative law judge and again here on appeal, concerns whether or not the claimant is an "employee" as defined in Section 2(3). The administrative law judge determined that the claimant was not engaged in maritime employment, that he was not engaged in longshoring operations, and so was not a Section 2(3) employee. This conclusion is erroneous as a matter of law.

Section 2(3) does not require that a claimant be engaged in moving cargo to a ship for immediate placement aboard, or in removing cargo from a ship, in order to qualify as an "employee"; he need only be engaged in longshoring operations, which include all essential steps in the overall process of loading cargo; his duties need only constitute an integral part of the continuous longshoring operation to support a conclusion that he was engaged in maritime employment. *Scalmato v. Northwest Marine Terminal Co.*, 1 BRBS 461, BRB No. 74-203 (May 7, 1975).

Contrary to the position of the administrative law judge, this Board does not subscribe to a "point of rest" theory, in which cargo is maritime in nature and those who handle it are engaged in maritime employment, only when that cargo is being moved from a dock to a ship. *See Ford v. P.C. Pfeiffer Co., Inc.*, 1 BRBS 367, BRB Nos. 74-191, 191A (Mar. 21, 1975). The legislative history of the Act clearly indicates that all cargo handling operations performed on land within the confines of a terminal are to be covered.

> . . . It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.
>
> The Committee believes that the compensation payable to a longshoreman . . . should not depend

> on the fortuitous circumstance of whether the injury occurred on land or over water.
>
> H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10 (1972).

The Board finds that the claimant's job in this case, unloading cotton bales from a truck in a pierside warehouse, was the first step in a longshoring operation which would eventually conclude at some future date with placement of the cotton in the hold of a ship. *See Powell v. Cargill, Inc.*, 1 BRBS 503, BRB Nos. 74-206, 206A (May 30, 1975). The administrative law judge misinterpreted Section 2(3) of the Act in determining that the claimant was not an "employee" as defined in that section.

This case is hereby remanded to the administrative law judge for entry of a compensation order in favor of the claimant, consistent with this opinion.

/s/ JULIUS MILLER
Julius Miller, Member

We Concur:

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

Dated this 13th day
of November, 1975

(Jurat Omitted in Printing)